

THE
P R I N C I P L E S
OF THE
L A W
OF
S C O T L A N D.

THE

PRINCIPLES

OF THE

LAW

OF THE

SCOTLAND

In the City of Glasgow, by
John Erskine, Esq. of the Faculty of Advocates,
Barrister at Law.

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Barrister at Law.

THE SEVENTH EDITION.

WITH CORRECTIONS AND ADDITIONS.

PRINTED BY JAMES WILSON, at the Edinburgh Press.

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In the order of Sir GEORGE MACKENZIE'S
Institutions of that Law.

BY THE LATE

JOHN ERSKINE Esq; of Cardross, Advocate,
PROFESSOR OF THE MUNICIPAL LAW OF SCOTLAND
IN THE UNIVERSITY OF EDINBURGH.

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WITH CORRECTIONS AND IMPROVEMENTS,

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Rec. June 4, 1902.

Note of abbreviations, and of the manner of quoting authorities.

<i>Ad S.</i>	<i>Ad</i> s of Sederunt of the Session.
<i>Books S.</i>	Books of Sederunt.
<i>R. M.</i>	Books of <i>Regiam Majestatem</i> .
<i>Q. Att.</i>	<i>Quoniam Attachamenta</i> .
<i>L. B.</i>	<i>Leges Burgerum</i> .
<i>St. 1. R. I.</i>	<i>Statuta prima Roberti primi</i> , and so of the other Statutes in <i>Skene's</i> collect.
<i>Cr.</i>	Sir <i>T. Craig de feudis</i> , quoted by the page and section of edition 1733, fol.
<i>Hope Min. Pr.</i>	Sir <i>T. Hope's</i> <i>Minors practicks</i> , by page and section of edition 1726, 8vo.
<i>St.</i>	<i>Visc. Stair's</i> Institutions, by the book, title, and section.
<i>Bankt. vol. 1. 2. or 3.</i>	Lord <i>Bankton's</i> Institute, by the vo- lume, page, and section.

Printed collections of decisions.

<i>Dirl.</i>	observed by Lord <i>Dirleton</i> .	} quoted by the number of the decision,
<i>Gilm.</i>	by President <i>Gilmour</i> .	
<i>P. Falc.</i>	by President <i>Falconer</i> .	
<i>Harc.</i>	by Lord <i>Harcarse</i> .	
<i>Dalr.</i>	by President <i>Dalrymple</i> .	
<i>Br.</i>	by Mr <i>Alexander Bruce</i> .	
<i>K.</i>	by Lord <i>Kames</i> .	
<i>Falc. vol. 1. or 2.</i>	by Mr <i>D. Falconer</i> , 2. vol.	} by date of de- cision and pur- suer's name.
<i>New Coll.</i>	either by a committee of Advocates, by itself, or vol. 2. in 2. vols.	
<i>Balf.</i>	by Sir <i>James Balfour</i> , quoted by the page and section.	} The
<i>Spotif. Pr.</i>	by Sir <i>R. Spotiswood</i> ,	
<i>F.</i>	by Lord <i>Fountainhall</i> , 2 vols.	

The manuscript collections by Lord *Haddington*, Sir *T. Hope*, Lord *Gosford*, Mr *Forbes*, Mr *Bruce*, &c. are marked *Hadd. Hop. Gosf. Forb. M. S. Br. M. S.* &c. by the date of the decision and the pursuer's name.

The decisions from 1621 to 1713, not distinguished by any name, are to be found in the printed collection by Lord *Dury*, Viscount *Stair*, or Mr *Forbes*.

As for the decisions after 1719, which are neither to be found in any printed collection, nor in the law dictionary, some few prior to *Nov. 1744*, were observed by the author. And those from that period, down to *Nov. 1749*, by the late *Charles Arskine* of *Alva*, Lord Justice Clerk, who had the goodness to allow to the author the use of his most valuable papers.

The decisions from *Nov. 1735*, to *July 1744*, in so far as they are contained in a printed collection during the period, are quoted by the dates as they stand in that collection.

The acts of parliament before the reign of *Ja. VII.* are quoted by the year of God, and number of the act, according to the edition 1681, fol.

The quotations from the Code of the Roman law are marked in the usual way, by the letter *C.* Those from the Pandects have no distinguishing letter.

The references from one part of this treatise to another, are marked by the number of the book, title, and section.

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T H E

S C O T L A N D.

B O O K I.

TIT. I. *Of Laws in general.*

LAW is the command of a sovereign, Law. containing a common rule of life for his subjects. It is divided into the law of nature, the law of nations, and civil or municipal law.

2. The law of nature is that which God, the Law of Sovereign of the universe, has prescribed to all nature. men, not by any formal promulgation, but by the internal dictate of reason alone. It is discovered by a just consideration of the agreeableness or disagreeableness of human actions.

tions to the nature of man ; and it comprehends all the duties we owe either to the Supreme Being, to ourselves, or to our neighbour ; as reverence to God, self-defence, temperance, honour to our parents, benevolence to all, a strict adherence to our engagements, gratitude, &c. This law is improperly attributed to the brute part of the creation ; for brutes act from necessity, and are not capable of proper obedience, nor consequently of law.

Law of 3. The law of nations is also the result of rea-
nations. son, and has God for its author ; but it supposes mankind formed into several bodies-politic, or states ; and it comprises all the duties which one state owes to another. These must of necessity be similar to the duties arising between individuals, since both are dictated by reason ; so that what is the law of nature, when applied to men considered simply as such, is indeed the law of nations, when applied to kingdoms or states. From this source proceeds the right of war, the security of ambassadors, the obligations arising from treaties, &c. The particular usages of nations in their mutual correspondence, which are not necessarily founded in reason, are no part of the law of nations in its proper sense ; for they are arbitrary, and derive their sole authority from compact, either express or presumed ; and may therefore, without violating the law of nature, be altered : For this reason, they ought to be thrown into the class of positive laws, whose obligation lasts no longer than the agreement upon which it is founded. Of this sort, are the ceremonial used in receiving and entertaining ambassadors, the privileges indulged to some of their servants, the
rules

rules observed in cartels for exchanging prisoners of war, &c.

4. Civil or municipal law, is that which every sovereign kingdom or state has appropriated to itself. The appellation of municipal was originally confined to the laws of *municipia*, or dependent states; but it came by degrees to signify all civil laws without distinction. No sovereign state can subsist without a supreme power, or a right of commanding in the last resort; the supreme power of one age cannot therefore be fettered by any enactment of a former age, otherwise it would cease to be supreme. Hence the law last in date derogates from prior laws, *l. 4. de const. princ.* Civil law.

5. The law of nature, where it either commands or forbids, is immutable, and cannot be controlled by any human authority; but where that law does no more than confer a right, without obliging us to use it, the supreme power may divest us thereof, in whole or in part. Thus, certain natural rights in point of dress, game, commerce, &c. are brought frequently, by positive enactment, under such restrictions as the legislator thinks most proper for the common interest. It sufficiently appears, that a sanction is annexed to the law of nature by its author, from the disquiet that fills the conscience upon a transgression thereof, though the person guilty should be without the reach of human penalties: But certain laws of nature, as gratitude, charity, benevolence, &c. have not been guarded with penalties by the positive enactment of any state, but are left entirely to the conscience. General properties of the law of nature.

6. Though

Promul-
gation of
laws.

6. Though the laws of nature are sufficiently published by the internal suggestion of natural light, civil laws cannot be considered as a rule for the conduct of life, till they are notified to those whose conduct they are to regulate. The Scots acts of parliament were, by our most ancient custom, proclaimed in all the different shires, boroughs, and baron-courts of the kingdom, 1425, c. 67.—1457, c. 89. But, after our statutes came to be printed, in consequence of 1540, c. 127. that custom, which was no longer necessary, was gradually neglected; and at last, the publication of our laws, at the market-cross of Edinburgh, was declared sufficient; and they became obligatory forty days thereafter, 1581, c. 128. *British* statutes are deemed sufficiently notified, without formal promulgation; either because the printing is truly a publication, or because every subject is by a maxim of the English law, party to them, as being present in parliament, either by himself or his representative. After a law is published, no pretence of ignorance can excuse the breach of it. *l. 9. pr. et § 3. de jur. et fact. ign.*

Declara-
tory laws.

7. As laws are given for the rule of our conduct, they can regulate future cases only; for past actions, being out of our power, can admit of no rule. Declaratory laws form no exception to this; for a statute, where it is declaratory of a former law, does no more than interpret its meaning; and it is included in the notion of interpretation, that it must draw back to the date of the law interpreted.

Divine
positive
law.

8. God himself gave by Moses to the Jews, a body of positive laws, which settled not only their public polity, but private right; but,

as that law was directed to the Jews alone, and almost wholly framed with a special view to the Jewish constitution, and to the genius of that people, it is but a small part of it which has been adopted by the legislature of other countries into their system of laws.

9. The Roman laws were, toward the middle Roman of the sixth century, reduced by the Emperor Justinian into one body, which consists of the Digests or Pandects, the Institutions, the Code, and the Novels. Upon the irruption of the Lombards into Italy, soon after Justinian's death, this law became almost forgotten, till the year 1130, when a copy of the Pandects having been recovered at Amalphi, it was taught by authority in the schools of Italy, and from thence spread quickly over Europe. The Roman law, from its peculiar beauty and elegance, got the appellation of *the civil law*, though that epithet was applicable originally to the laws of all countries alike. In several acts of parliament, this law, sometimes by itself, 1540, c. 69.—1585, c. 18. and sometimes in conjunction with the canon law, 1540, c. 80.—1551, c. 22. goes under the name of the *common law*. Where the expression in the act is fuller, *the common laws of the realm*, it signifies perhaps our own ancient customary law, 1503, c. 79.—1584, c. 131. &c.*

10. Soon after the recovery of the Pandects, a body of law was formed under the direction of the Bishop of Rome, stiled the Canon law.

* The epithet of *common law* is used by English lawyers, to denote their most ancient customary law, anterior to statute.—*Blackstone, Introd. Sect. 3.*

Canon Law. It contained rules, not only for informing the conscience, but for the fixing of property, civil as well as ecclesiastical ; and had the authority of law, in the countries where the Pope was temporal sovereign : But all the other nations of Christendom, even those which acknowledged the See of Rome, thought themselves at liberty, in so far as it related to civil right, either to reject it, or to receive it with such limitations as they judged proper. The canon law consists of the *Decretum*, which, in imitation of the Roman Digests, was composed by Gratian, a Benedictine Monk, from the judgments of the fathers, doctors, and church-councils ; and of the decretal epistles, which, after the pattern of Justinian's code, is a collection of the rescripts and constitutions of the Popes.

Law of
Scotland.

11. The municipal law of Scotland, as of most other countries, consists partly of statutory or written law, which has the express authority of the legislative power ; partly of customary or unwritten law, which derives force from its presumed or tacit consent.

Our writ-
ten law.
Acts of
parlia-
ment.

12. Under our statutory or written law is comprehended, first, our acts of parliament ; not those only which were made in the reign of James I. of Scotland, and from thence down to our union with England in 1707, but such of the British statutes enacted since the union as concern this part of the united kingdom.

Regiam
majesta-
tem.

13. The remains of our ancient written law were published by Sir John Skene, clerk-register, in the beginning of the last century, by licence of parliament, *Index to unprinted acts*, 1607, No. 31. The books of *regiam majestatem*, to which the whole collection owes its title,
seem

seem to be a system of Scots law, written by a private lawyer at the command of David I.; and though no express confirmation of that treatise by the legislator appears, yet it is admitted to have been the ancient law of our kingdom, by express statutes, 1471, c. 48.—1487, c. 115. The borough-laws, which were also enacted by the same King David, and the statutes of William, Alexander II. David II. and the three Roberts, are universally allowed to be genuine. Our parliaments have once and again appointed commissions to revise and amend the *Regiam majestatem*, and the other ancient books of our law, and to make their report, 1425, c. 54.—1487, c. 115—1633, c. 20.; but as no report appears to have been made, nor consequently any ratification by parliament, none of these remains are received, as of proper authority, in our courts; yet they are of excellent use in proving and illustrating our most ancient customs.

14. Our written law comprehends, 2. the Acts of acts of Sederunt, which are ordinances for re-Sederunt. gulating the forms of proceeding, before the court of session, in the administration of justice, made by the judges, who have a delegated power from the legislature for that purpose, 1540, c. 93. Some of these acts touch upon matter of right, which declare, what the judges apprehend to be the law of Scotland, and what they are to observe afterwards as a rule of judgment.

15. The civil and canon laws, though they are not perhaps to be deemed proper parts of our written law, have undoubtedly had the greatest influence in Scotland. The powers exercised The authority of the civil and canon laws.

exercised by our sovereigns and our judges, have been justified upon no other ground, than that they were conformable to the civil or canon laws, 1493, c. 51.—1540, c. 69 &c. And a special statute was judged necessary, upon the reformation, to rescind such of their constitutions as were repugnant to the Protestant doctrine, 1567, c. 31. From that period, the canon law has been little respected, except in questions of tithes, patronages, and some few more articles of ecclesiastical right: But the Roman continues to have great authority in all cases, where it is not derogated from by statute or custom, and where the genius of our law suffers us to apply it; 1493, c. 51.—1540, c. 70.—1587, c. 31.

Unwritten law or custom.

Its properties.

16. Our unwritten or customary law, is that which, without being expressly enacted by statute, derives its force from the tacit consent of King and people; which consent is presumed from the ancient custom of the community, *l.* 32. § 1. *de legib.* as the laws of primogeniture and succession, the legitim, terce, courtesy, &c. No precise time can be fixed, as necessary for constituting this sort of law; because some things require in their nature longer time and a greater frequency of acts to establish them, than others. Custom, as it is equally founded in the will of the lawgiver with written law, has therefore the same effects: Hence, as one statute may be explained or repealed by another, so a statute may be explained by the uniform practice of the community, *l.* 37. *de legib.* and even go into disuse, by a posterior contrary custom. But this power of custom to derogate from prior statutes, is generally confined

fin'd by lawyers to statutes concerning private right, and does not extend to those which regard public policy.

17. An uniform tract of the judgments or Decisions of the court of session, is commonly of the considered as part of our customary law; and session. without doubt, where a particular custom is thereby fixed or proved, such custom of itself constitutes law: But decisions, though they bind the parties litigating, have not, in their own nature, the authority of law in similar cases; yet, where they continue uniform, great weight is justly laid on them. Neither can the judgments of the house of Peers of Great Britain reach farther than to the parties in the appeal, since in these, the Peers act as judges, not as lawgivers; nevertheless, where a similar judgment is repeated in the court of the last resort, it must have the strongest influence upon the determinations of inferior courts.

18. By the rules of interpreting statute law received in Scotland, an argument may be used from the title to the act itself, *a rubro ad nigrum*; at least, where the rubric has been either originally framed, or afterwards adopted by the legislature *. The preamble or narrative, which recites the inconveniencies that had arisen from the former law, and the causes inducing the enactment, may also lead a judge to the general meaning of the statute. But the chief weight is to be laid on the statutory words.

19. Laws, being directed to the unlearned as well as the learned, ought to be construed in their most obvious meaning, and not explained

B

plained

* Mack. Obs. on 1424, c. 23.

Prohibi-
tory laws

plained away by subtle distinctions; and no law is to suffer a figurative interpretation, where the proper sense of the words is as commodious, and equally fitted to the subject of the statute. Laws ought to be explained so as to exclude absurdities, *l. 19. de legib.*; and in the sense which appears most agreeable to former laws, *l. 28. eod. t.* to the intention of the lawgiver, *l. 17. 18. eod. t.* and to the general frame and structure of the constitution. In prohibitory laws, where the right of acting is taken from a person, solely for the private advantage of another, the consent of him, in whose behalf the law was made, shall support the act done in breach of it; but the consent of parties immediately interested has no effect in matters which regard the public utility of a state, *l. 38. de pact.* Where the words of a statute are capable but of one meaning, the statute must be observed, however hard it may bear on particular persons, *l. 12. §. 1. qui et a quib.*: Nevertheless, as no human system of laws can comprehend all possible cases, more may be sometimes meant by the lawgiver than is expressed; and hence certain statutes, where extension is not plainly excluded, may be extended beyond the letter, to similar and omitted cases; others are to be confined to the statutory words.

Interpre-
tation by
exten-
sion.

Strict in-
terpreta-
tion.

20. A strict interpretation is to be applied,
1. To correctory statutes, which repeal or re-
strict former laws, *l. 14. de legib.* and to sta-
tutes which enact heavy penalties, or restrain
the natural liberties of mankind. 2. Laws,
made on occasion of present exigencies in a
state, ought not to be drawn to similar cases,
after

after the pressure is over. 3. Where statutes establish certain solemnities as requisite to deeds, such solemnities are not suppliable by equivalents; for solemnities lose their nature, when they are not performed specifically.

4. A statute, which enumerates special cases, is, with difficulty, to be extended to cases not expressed; but, where a law does not descend to particulars, there is greater reason to extend it to similar cases. 5. Statutes, which carry a dispensation or privilege to particular persons or societies, suffer a strict interpretation; because they derogate from the general law, and imply a burden upon the rest of the community: But at no rate can a privilege be explained to the prejudice of those in whose behalf it was granted. As the only foundation of customary law is usage, which consists in fact, such law can go no farther than the particular usage has gone.

21. All statutes, concerning matters special-^{Ample}ly favoured by law, receive an ample inter-^{interpre-}pretation; as laws for the encouragement of commerce, or of any useful public undertaking, for making effectual the wills of dying persons, for restraining fraud, for the security of creditors, &c. A statute, though its subject-matter should not be a favourite of the law, may be extended to similar cases which did not exist when the statute was made; and for which, therefore, it was not in the lawgiver's power to provide.

22. Every statute, however unfavourable, must receive the interpretation necessary to give it effect: And, on the other hand, in the extension of favourable laws, scope must not be

be given to the imagination, in discovering remote resemblances; the extention must be limited to the cases immediately similar. Where there is ground to conclude, that the legislature has omitted a case out of the statute purposely, the statute cannot be extended to that case, let it be ever so similar to the cases expressed.

TIT. 2. *Of Jurisdiction and Judges in general.*

Jurisdiction.

THE objects of law are persons, things, and actions: Among persons, judges, who are invested with jurisdiction, deserve the first consideration. Jurisdiction is a power conferred upon a judge or magistrate, to take cognisance of, and decide causes according to law, and to carry his sentences into execution. That tract of ground, or district, within which a judge has the right of jurisdiction, is called his territory: And every act of jurisdiction, exercised by a judge without his territory, either by pronouncing sentence, or carrying it into execution, is null, *l. 20. de jurisd.*—
5. Dec. 1671. Millar.

The King the fountain of jurisdiction.

2. The supreme power, which has the right of enacting laws, falls naturally to have the right of erecting courts, and appointing judges, who may apply these laws to particular cases: But, in Scotland, this right has been, from our earliest times, intrusted with the Crown, as having the executive power of the state. In our supreme courts of Session and Exchequer, not only process, but execution of diligence, runs in the name of the Sovereign; notwithstanding

standing which, these courts have a proper jurisdiction, seeing all their necessary writs, both of process and execution, issue under their own direction.

3. Jurisdiction was, by the Roman law, either voluntary or contentious. Voluntary, was that which related to matters that admitted of no opposition; and therefore might be exercised by any judge, and upon any day, and in any place. Contentious, was that which was exercised in debatable matters, which were, by their nature, capable of receiving a judicial discussion; and this sort could not be proceeded in, but upon a lawful day, in court, and by that judge alone who was competent to the suit. The judicial ratifications of women cloathed with husbands, may be classed among the acts of voluntary jurisdiction, *F. 3. Feb. 1688. Cochrane.*

4. Jurisdiction is either supreme, inferior, or mixed. That jurisdiction is supreme, from which there lies no appeal to a higher court. Though the British House of Peers is, since the union of the two kingdoms, our only supreme court in a strict acceptation, our courts of Session, Justiciary, and Exchequer, may still be called supreme in a lower sense; as their jurisdiction is universal over the whole kingdom, as the sentences of all other courts are subject to the review of one or other of them, and as *their* sentences can be brought under review by no court proper to Scotland. Inferior courts, are those whose sentences are subject to the review of the supreme courts, and whose jurisdiction is confined to a particular county, borough, or other territory; as sheriffs, justices of the peace, magistrates of boroughs, inferior admirals and commissaries,

commissaries, barons, &c. Mixed jurisdiction participates of the nature both of the supreme and inferior: Thus, the Judge of the High Court of Admiralty, and the Commissaries of Edinburgh, have an universal jurisdiction over Scotland, and they can review the decrees of inferior admirals and commissaries; but, since their own decrees are subject to the review of the Courts of Session or Justiciary, they are, in that respect, inferior courts.

civil and
criminal;

5. Jurisdiction is either civil or criminal: By the first, questions of private right are decided; by the other, crimes are punished. But, in all jurisdiction, though merely civil, there is a power inherent in the judge to punish, either corporally, or by a pecuniary fine, those who offend during the proceedings of the court, or who shall afterwards obstruct the execution of the sentence; *omnia enim cum jurisdictione concedi videntur, sine quibus jurisdictio explicari nequit, l. 2. de jurisd.*

privative
and cumulative;

6. Jurisdiction is either privative or cumulative. Privative jurisdiction, is that which belongs only to one court, to the exclusion of all others. Cumulative, otherwise called concurrent, is that which may be exercised by any one of two or more courts, in the same cause. In civil cumulative jurisdiction, the private pursuer has the right of election before which of the courts he shall sue; but as in criminal questions which are prosecuted by a public officer of court, a collision of jurisdiction might happen, through each of the judges claiming the exercise of their right, that judge, by whose warrant the delinquent is first cited or apprehended, (which is the first step of jurisdiction),

tion), acquires thereby (*jure praeventionis*,) the exclusive right of judging in the cause. But no citation by the procurator-fiscal, or public prosecutor of one court, which is simply intended *ad vindictam publicam*, can bar the private party injured from bringing his process for damages, which is a right merely civil, before any other competent court, 9. Nov. 1672, *Scot. Gosford*, July 1. 1673. *Fork*.

7. All rights of jurisdiction, being originally personal granted in consideration of the fitness of the grantee, were therefore personal, and died with himself. But, upon the introduction of the feudal system, by which certain jurisdictions, as of sheriff-ship, regality, &c. were annexed to lands, these jurisdictions became patrimonial and descendible to heirs, as well as the lands to which they were annexed; and even after sheriff-ships ceased to be territorial, by the Sovereign's resuming the jurisdiction to himself from the proprietors of the lands to which it was originally annexed, *Cr.* 104. §. 14. the crown frequently made heritable grants of them to others: But, by 20. *Geo.* II. c. 43. all heritable jurisdictions, except those of admiralty, and a small pittance reserved to barons, are either abolished, or resumed and annexed to the crown.

8. Jurisdiction is either proper or delegated. Proper jurisdiction, is that which belongs to a judge or magistrate himself, in virtue of his office. Delegated, is that which is communicated by the judge, to another who acts in his name, called a depute or deputy. The sheriffs appointed by the jurisdiction act are improperly termed sheriffs.depute. Where a deputy appoints

appoints one under him, he is called a substitute. No grant or jurisdiction, which is an office requiring personal qualifications, can be delegated by the grantee to another, without an express power in the grant. Such power has been given in all personal grants of sheriffship, stewardry, admiralty, &c.; but justices of the peace and magistrates of burghs have no power of deputation. In patrimonial jurisdiction, as it was possible the heritable officer might be incapable of rightly discharging the office in proper person, he was empowered to appoint deputies, for whom he should be answerable, 1424, c. 6.

Civil jurisdiction is founded, 1st, *ratione domicilii*;

9. Civil jurisdiction is founded, 1. *ratione domicilii*, if the defender has his domicile within the judge's territory. A domicile is the dwelling place where a person lives, with an intention to remain; and custom has fixed it as a rule, that residence for forty days founds jurisdiction. If one has no fixed dwelling place, e. g. a soldier, or a travelling merchant, a personal citation against him within the territory, is sufficient to found the judge's jurisdiction over him, even in civil questions, F. 12. Nov. 1709, *Lees*. As the defender is not obliged to appear before a court to which he is not subject, the pursuer must follow the defender's domicile, *Actor sequitur forum rei*.

2. *Ratione rei sitae*.

10. It is founded, 2. *ratione rei sitae*, if the subject in question lie within the territory. If that subject be immoveable, the judge, whose jurisdiction is founded in this way, is the sole judge competent, excluding the judge of the domicile; for an immoveable subject cannot shift places; and must therefore be restored in that place where it is situated.

11. Where one, who has not his domicile Letters of within the territory, is to be sued before an inferior court *ratione rei sitae*, the Court of Session must be applied to, whose jurisdiction is universal, and who, of course, grant letters of supplement to cite the defender to appear before the inferior judge. Where the party to be sued resides in another kingdom, and has an estate in this, the Court of Session is the only proper court, as the *commune forum* to all persons residing abroad; and the defender, if his estate be heritable, is considered as lawfully summoned to that court by a citation at the market-cross of Edinburgh, and pier and shore of Leith: But where a stranger, not a native of Scotland, has only a moveable estate in this kingdom, he is deemed to be so little subject to the jurisdiction of our courts, that action cannot be brought against him, till his effects be first attached by an arrestment *jurisdictionis fundandae causa*, *Harc.* 487. which is laid on by a warrant issuing from the supreme courts of Session or Admiralty; or from that within whose territory the subject is situated, at the suit of the creditor.

12. A judge may, in special cases, arrest or Arrest-secure the persons of such as have neither do-ment of micile nor estate within his territory, even for strange civil debts. Thus, on the border between Scotland and England, warrants are granted of course by the judge ordinary of either side, against those who have their domicile upon the opposite side, for arresting their persons, till they give caution *judicio fisci*: And even the persons of citizens or natives may be so secured, where there is just reason to suspect that they

are in *meditatione fugae*, i. e. that they intend suddenly to withdraw from the kingdom; upon which suspicion, the creditor who applies for the warrant must make oath. An inhabitant of a borough royal, who has furnished one who lives without the borough, in meat, clothes, or other merchandise, and who has no security for it but his own count-book, may arrest his debtor, till he give security *judicio fisti*, 1672, c. 8.

Grounds
of decli-
nature.

1. *Ratione
causae*;

2. *Ratione
suspecti ju-
dicis*;

13. A judge may be declined, i. e. his jurisdiction disowned judicially, 1. *ratione causae*, from his incompetency to the special cause brought before him. Thus, the Court of Session may be declined in criminal causes, inferior judges in declarators of property, &c. 2. *Ratione suspecti judicis*; where either the judge himself, or his near kinsman, has an interest in the suit. Where a company is constituted by patent or act of Parliament, by which a public benefit is intended, a judge cannot be declined in the cause of such company, merely because he is a proprietor; an example of which we have in our bank companies; see *Voet. Com. tit. de judic. §. 45*. The judges of the Session were, by 1594, c. 212. disqualified from voting in the causes of their fathers, brothers, or sons: But, by 1681, c. 13. one rule is laid down for all judges, supreme and inferior, that no judge can vote in the cause of his father, brother, or son, either by consanguinity or affinity; nor in the cause of his uncle or nephew by consanguinity. A deputy may be declined, as suspected, where the principal judge is a party, 1555, c. 39. §. *ult.* except in causes in which he is authorised to judge by special statute, 1579, c. 84.

14. Judges may be declined, 3. *ratione privilegii*; where the party is by privilege exempted from their jurisdiction: Thus all members of the College of Justice may decline the jurisdiction of inferior judges, 1555, c. 39.: But, as such privilege has no operation till it be pleaded, therefore, if declinature be not proposed, the judge may proceed in the cause. The privilege, exempting members of Parliament from civil jurisdiction, sitting the Parliament, is so strongly founded, that action cannot proceed against them, unless they expressly wave their privilege.

15. Prorogated jurisdiction (*jurisdictio in consentientes*) is that which is, by the consent of parties, conferred upon a judge, who, without such consent, would be incompetent. A defender's absence does not infer his consent; the decree will be void, as pronounced *a non suo judice*, if an explicit consent be not adhibited, or some positive act done by the defender, importing consent, e. g. exhibiting defences *in causa*; because, where a judge is incompetent, every step he takes must be null, till his jurisdiction be made competent by the party's actual submission to it. It is otherwise where the judge is competent, but may be declined by the party upon privilege, *supr.* §. 14. Where the defender pleads a declinature which is repelled, prorogation is not inferred, though he should afterwards offer defences *in causa*, F. 29. July 1696, *Shaw*.

16. A clause, consenting to the registration of a writing in the books of a judge's court, does not imply a prorogation of that jurisdiction, in any question that may be moved Does a clause for registering import consent?

ved afterwards upon the effect of the writing; such consent is limited to the registration, which is *quodammodo jurisdictionis voluntariae*, and is not to be stretched, by implication, to acts of contentious jurisdiction.

2. Jurisdiction in the judge.

17. In order to prorogation, the judge must have jurisdiction, such as may be prorogated, *l. 1. de judic.* Hence, prorogation cannot be admitted, where the judge's jurisdiction is excluded by statute; which seems to be the case of 1681, *c. 13.* Hence likewise, no consent can prorogate the jurisdiction of a judge whose commission is vacated, or its term expired; nor of a judge while he is out of his territory. But a defender, though his domicile be without a judge's jurisdiction, may, if cited within the territory, subject himself to the jurisdiction, by appearing in court, and offering peremptory defences, 23. *Feb. 1627, Service.*

Prorogatio de causa in causam.

18. In questions of civil jurisdiction, a judge, who was only constituted to a certain sort of causes, might, by the Roman law, have had his jurisdiction prorogated to causes of a different nature, *l. 1. C. de jurisd. amm. jud.* By our practice, such prorogation is rejected, *P. Fale. 13.* Yet, where the cause is of the same nature, with those to which the judge is competent, though law may have confined his jurisdiction within a certain sum, parties may prorogate it above that sum, unless where prorogation is prohibited; an instance of which prohibition we have in the jurisdiction of barons, as restricted by 20. *Geo. II. c. 43.* Prorogation is not admitted in the King's causes; for the interest of the crown cannot be hurt by the negligence of its officers, in the management

ment of processes, 1600, c. 14.—19. Jan. 1711, *Eyres*.

19. All judges must at their admission swear, Oaths to
 1. The oath of allegiance, and subscribe the as- be taken
 surance, 1693, c. 6. 2. The oath of abjura- by judges.
 tion, which was first imposed 6. *An. c. 14.* and
 has been since continued by several British sta-
 tutes. 3. The oath of supremacy, 1. *Geo. 1. c.*
 13. Lastly, the oath *de fidei administratione*.

20. A party who has either properly declin- Letters of
 ed the jurisdiction of the judge before whom advoca-
 he had been cited, or who thinks himself ag- tion;
 grieved by any proceedings in the cause, may,
 before decree, apply to the Court of Session to
 issue letters of advocation for calling the action
 from before the inferior court to themselves.
 The grounds, therefore, upon which a party
 may pray for letters of advocation, are incom-
 petency and iniquity. Under incompetency, is Upon in-
 comprehended not only defect of jurisdiction, compe-
 but all the grounds of declining a jurisdiction, tency;
 in itself competent, arising either from suspi-
 cion of the judge, or privilege in the parties.
 A judge is said to commit iniquity, when he Upon in-
 either delays justice, or pronounces sentence, quity;
 in the exercise of his jurisdiction, contrary to
 law.

21. Though the grounds, on which letters of Effect of
 advocation proceed, are personal, respecting that advoca-
 judge alone who is incompetent, or who has tion.
 committed iniquity; yet their style carries an
 injunction to all inferior judges not to proceed
 in the cause: And, even where that part of
 style happened to be omitted, the nature of an
 advocation was adjudged to imply a general
 prohibition, 18th July 1623, *Cranstoun*. But,
 till

till the advocation be intimated, it can neither restrain judges from deciding, nor parties from insisting. If, after intimation, a judge shall presume to proceed, his sentence is null; and both he, and the party insisting, are punishable for contempt of authority.

How limited.

22. That the Court of Session may not waste their time in trifles, no cause for a sum below 200 merks Scots, 1663, *c.* 9. (now 12 *l.* Sterling, by 20 *Geo.* II. *c.* 43.) can be advocated to the Court of Session from the inferior judge competent: But, if an inferior judge shall proceed upon a cause, to which he is incompetent, the cause may be carried from him by advocation, let the subject be ever so inconsiderable.

TIT. 3. Of the supreme Judges and Courts of SCOTLAND.

King.

THE King, who is the fountain of jurisdiction, might, by our constitution, have judged in all causes, either in his own person, 1469, *c.* 27. *in fin.* of which Sir Thomas Craig gives a strong instance, *p.* 519. §. 12. or by those whom he was pleased to vest with jurisdiction. In the reign of Charles II. the Parliament extended this part of the prerogative, by declaring, that the King retained a cumulative jurisdiction, notwithstanding any offices or grants of jurisdiction formerly conferred upon his subjects, 1681, *c.* 18.; in consequence of which, he assumed a power of erecting regalities within the bounds of heritable sheriff-ships, &c. But this act was repealed, 1690, *c.* 28.

2. The

2. The Parliament of Scotland, as our court Parliament of the last resort, had the right of reviewing the sentences of all our supreme courts; particularly those of the Court of Session, against which parties have been early in use to protest, for remedy of law, to King and Parliament, *Books S. 29. Jan. 1554-5, and 7. March 1561-2.* The Court of Session in 1674 (founding their plea upon 1457, *c. 62.* joined with 1537, *c. 59.*) disallowed this right, and procured an order of council for banishing all the advocates who would not disclaim the lawfulness of appeals to Parliament, twelve miles from Edinburgh; but the convention of estates 1689, *c. 13.* asserted it to be the right of every subject to protest for remedy of law against the sentences of the Session.

3. Private acts, or ratifications of private grants by Parliament, as they passed of course, without hearing those having interest, could not hurt the right of third parties; for which reason, they are declared subject to reduction by the Court of Session, 1567, *c. 18. No. 1.* And all the sessions of our Scots Parliaments, downwards from James VI. were closed with an act, saving the right of third parties.

4. By the treaty of Union, 1707, *c. 7. art. 3.* the Parliaments of Scotland and England are united into one Parliament of Great Britain. From this period, the British House of Peers, as coming in place of the Scots Parliament, is become our court of the last resort, to which appeals lie from all the supreme courts of Scotland: But that court has no original jurisdiction in civil matters, in which they judge only upon appeal. By *art. 22.* of that treaty, the Scots share

Scots re-
presenta-
tion in it. share of the representation in the House of Peers is fixed to sixteen Scots Peers elective, and, in the House of Commons, to forty-five Commoners; of which thirty are elected by the freeholders of counties, and fifteen by the royal boroughs. The principal acts relating to the right of election, are 1681, *c.* 21.—1707, *c.* 8.—6. *An. c.* 6. and 23.—12. *Ant. st.* 1. *c.* 6.—2. *Geo. II. c.* 24.—7. *Geo. II. c.* 16.—16. *Geo. II. c.* 11.

Privy
council.

5. The King, although he might have determined all causes by himself, committed the regular exercise of that branch of his prerogative to his stated judges, as Justiciary, sheriffs, &c. except in certain particular trials, which parties were at liberty to bring, either before the King and his council, or before the judge-ordinary, *arg.* 1425, *c.* 65. compared with 1457, *c.* 61. After the jurisdiction of the council was transferred from them to the Session, and from the Session to the judge-ordinary, in the manner to be explained next section, the judicial powers of the council seemed to be confined to questions which called for the more special attention of the public, 1487, *c.* 105. This council was styled the King's secret, or privy council, 1489, *c.* 12.—1609, *c.* 14 in contradistinction to the parliament, which was the great or general council, 1457, *c.* 75.—1537, *c.* 40.; and it came at last, besides its powers in matters of state and government, to be vested with a fixed supreme jurisdiction in all questions that had a relation to the public peace. They inquired into, and punished violent encroachments upon possession, and other grosser breaches of the peace; they decree alimony to pupils, and to wives barbarously

barously used by their husbands, and judged in many other questions of that sort, where summary proceeding was necessary: But, by 6. *An. c. 6.* the Scots privy council was abolished, and sunk into that of Great Britain, which for the future is declared to have no other powers than the English privy council had at the time of the union.

6. A court was erected by 1425, *c. 65.* consisting of certain persons to be named by the King, out of the three estates of parliament, which was vested with the jurisdiction formerly lodged in the Council, and got the name of the Session; because, in place of being itinerant, and without any fixed terms of sitting, it was ordained to hold annually a certain number of Sessions, at the places to be specially appointed by the King. This court had a jurisdiction, cumulative with the judge ordinary, in spuilzies, and other possessory actions, and in debts; but they had no cognisance in questions of property of heritable subjects, 1457, *c. 61.* No appeal lay from its judgments to the parliament, *ib. c. 62.* The judges of this court served by rotation, and were changed from time to time, after having sat forty days, *ib. c. 63.* and became so negligent in the administration of justice, that it was thought necessary, first, to pass several acts, 1469, *c. 27.*—1475, *c. 63.* ordaining all causes to be pursued before the judges ordinary, with a power to the parties aggrieved by the negligence or partiality of the judge, to apply to the King and council for justice and redress; and at last, by 1503, *c. 58.* to transfer the jurisdiction that had formerly
D been

been in the Session to a council to be named by the King, called the daily council.

Or col-
leg. of
Justice

The jud-
ges there-
of, by
whom
named.

7. The present model of the court of Session, or college of justice, was formed in the reign of James V. The judges thereof, who are, by 1537, c. 36 vested with an universal civil jurisdiction. consisted originally of seven churchmen, seven laymen, and a president, whom it behoved to be a prelate, *arg.* 1579, c. 93. : And even after the reformation, parsons, rectors, and other churchmen, were received as judges. Parochial ministers were first disqualified for the office by 1584, c. 133. Afterwards, by 1640, c. 26. which extended the prohibition to all churchmen, the distinction of spiritual and temporal judges was suppressed: And tho' that act was not renewed after the restoration, no clergyman has been, since that period, admitted to the bench. The judges of Session have been always received by warrants from the crown. His Majesty, 1579, c. 93. seems to have transferred to the court itself the right of chusing their own president; and in a *federunt* recorded 26. June 1593, the King condescended to present to the Lords, upon every vacancy in the bench, a list of three persons, out of which they were to chuse one; in which form, Mr John Preston of Fenton was admitted, 8. March 1595-6, and Mr David Macgill of Cranston, 23. May 1597. But his Majesty soon resumed the exercise of both rights, which continued with the crown till the usurpation; when it was ordained, that the King should name the judges of the Session, by the advice of parliament, 1641, c. 15. After the restoration,

tion, the nomination was again declared to be solely in the Sovereign, 1661, *c.* 2.

8. Tho' judges may, in the general case, be named at the age of twenty-one years, the Lords of Session must be at least twenty-five, 1592, *c.* 132.; by which statute, other qualifications are also required to that office. By 1707, *c.* 7. *art.* 19. no person can be named Lords of Session, who has not served as an advocate or principal clerk of Session for five years, or as a writer to the signet for ten: And, in the case of a writer to the signet, he must undergo the ordinary trials upon the Roman law, and be found qualified, two years before he can be named. Upon a vacancy in the bench, the King presents the successor by a letter addressed to the Lords, wherein he requires them to try and admit the person presented. The Lords, at the desire of Charles II. fixed the method of trial by *Act. S.* 31. *July* 1674. The powers given them to reject the presentee upon trial, 1579, *c.* 93. are taken away, by 10. *Geo.* 1. *c.* 19. and a bare liberty to remonstrate substituted in its place.

9. Besides the fifteen ordinary judges, the King was allowed to name three or four of his great council, who might sit and vote with them, 1537, *c.* 40. Upon a complaint made by the court of Session, that the crown had exceeded the fixed number of extraordinary Lords, James VI. by a letter recorded, *Books S.* 28. *March* 1617, promised to restrict himself to four, which number was from that time never exceeded. By the said *act 10. Geo.* 1. no vacancy happening thereafter, through the death of any extraordinary Lord, can be supplied.

Quorum. plied. At the first institution, ten Lords, with the president, made a quorum, 1537, *c.* 57. : But it appears from 1587, *c.* 44. that the practice prior to that statute had reduced the quorum to nine ordinary Lords.

Privileges of the college of Justice. 10. The appellation of the College of Justice is not confined to the judges, who are distinguished by the name of Senators, 1540, *c.* 93. ; but comprehends advocates, clerks of Session, writers to the signet, and others, as described, *Act. S.* 23. *Feb.* 1687. Where therefore the College of Justice is entitled to any privilege, it extends to all the members of the college. Besides the privilege mentioned under the former title, §. 14. they are exempted from watching, warding, and other services within borough, 1592, *c.* 153. ; and from the payment of ministers stipends, and of all customs, &c. imposed upon goods carried to or from the city of Edinburgh, said *Act. S.* *.

Jurisdiction of the Session in crimes ; 11. Though the jurisdiction of the Session be properly limited to civil causes, 1537, *c.* 36. the judges have always sustained themselves as competent to the crime of falsehood, either from its necessary connection with civil right, or perhaps, because the summary proceedings of the Court of Justiciary were not well adapted to the tedious proofs frequently brought in improbation, when pursued in the indirect manner. Where the falsehood is alleviated by

* These privileges were lately called in question by the magistrates of Edinburgh, and being sustained by the Court of Session, the cause was appealed to the House of Lords, where the decree of the Session was affirmed, and the privileges of the College of Justice solemnly ratified, March 1790.

by favourable circumstances, the Judges themselves inflict the punishment by imprisonment, fine, &c. ; but where it deserves death or membration, they, after finding the crime proved, remit the criminal to the Court of Justiciary. Special statute has given to the Court of Session jurisdiction in contraventions of lawburrows, deforcements, and breach of arrestments, 1581, c. 117. 118. And they have been in use to judge in battery *pendente lite*, and in usury, though statute seems to have excluded them, 1594, c. 219.—1597, c. 247.

12. In certain civil causes, the jurisdiction in civil of the Session is exclusive of all inferior jurisdictions ; as in declarators of property, and other competitions of heritable rights, provings of the tenor, *cessiones bonorum*, restitution of minors, reductions of decrees or of writings, sales of the estates of minors or bankrupts, &c. In a second class of causes, their jurisdiction can be only exercised in the way of review, after the cause is brought from the inferior court ; as in maritime and consistorial causes, which must be pursued in the first instance before the admiral or commissary ; and in actions below two hundred marks, which must be commenced before the judge ordinary, 1672, c. 16. §. 16. *Concerning the Session.* In all civil actions which fall under neither of these classes, the jurisdiction of the Session is concurrent, even in the first instance, with that of the judge-ordinary. The Session may proceed as a court of equity, by the rules of conscience, in abating the rigour of law, and giving aid in proper cases to such as in a court of law can have no equity-remedy : And this power is inherent in the
supreme

The Session is a court of

supreme court of every country, where separate courts are not established for law and for equity.

Justiciar.

13. The supreme criminal judge was styled the justiciar, and he had antiently an universal civil jurisdiction, even in matters of heritage, *R. M. l. 1. c. 5. § 3. 4.—l. 2. c. 16. § 37.* He was obliged to hold two justice-courts or ayres yearly, at Edinburgh or Peebles, where all the freeholders of the kingdom were obliged to attend, *2. Att. c. 79.* Besides this universal court, special justice-ayres were held in all the different shires in the kingdom, twice in the year, *Stat. R. III. c. 30.—1440, c. 5. &c.* These last having gone into disuse, his Majesty was authorised, 1587, *c. 81.* either by himself or his justice-general, to name eight deputies, two for every quarter of the kingdom, who should make their circuits over the whole in April and October.

Circuit
courts.

14. The office of deputies was suppressed by 1672, *c. 16.*; and five Lords of Session were added, as commissioners of Justiciary, to the justice-general and justice-clerk. The justice-general, if present, is constant president of the court, and in his absence the justice-clerk. This statute divides the kingdom into three districts, and appoints two of the judges of the new-erected court to hold circuits in certain boroughs of each district, once a-year in May. Soon after the union, circuit courts were appointed to be held twice in the year by 6. *An. c. 6.* Afterwards they were, by 10. *An. c. 33.* brought back to the regulation of 1672; and now again, by the late jurisdiction-act 20. *Geo. II.* they are to be held twice in

in the year; with a power to his Majesty to add to, or alter the places or districts at which these courts are to be held, and appoint their times of meeting. One judge may, by the last quoted statute, proceed to business in the absence of his colleague.

15. By *St. Al. c. 14. §. 2.* the crimes of robbery, rape, murder, and wilful fire-raising, (the four pleas of the crown), are said to be reserved to the King's court of Justiciary; but the only crime, in which, *de praxi*, the jurisdiction of Justiciary became at last exclusive of all inferior criminal jurisdiction, was that of high treason, *Mack. Crim. tit. Jurisd. of Reg.* Treason is since the union triable, not only by the Justiciary, but by special commission of *oyer and terminer*, in which three of the Lords of Justiciary must be named, whereof one to be of the quorum, *7. An. c. 21.* The court of Justiciary, when sitting at Edinburgh, has a power of advocating causes from all inferior criminal judges, and of suspending their sentences. Formerly, the Court of Session assumed the power of advocating criminal causes from inferior courts, not only on incompetency, but iniquity, in order again to remit them to the proper judge: But the Session has not interposed in such advocations since the Justiciary was new modelled by statute 1672.

16. The circuit-court has, by the late jurisdiction-act, a power given them to judge in all criminal causes which do not infer death or demembration, upon appeal from any inferior court within their district. By the same statute, a supreme civil jurisdiction is also given to them, by way of appeal, in all causes not exceeding

exceeding 12l. Sterling, in which their decrees are not subject to review ; but no appeal is to lie to the circuit, till the cause be finally determined in the inferior court. This last branch of the act was only temporary, but is now made perpetual by 31. *Geo. II. c. ult.*

Exche-
quer.

17. The Scots court of Exchequer, as the King's chamberlain-court, judged in all questions of the revenue. By 6. *An. c. 26.* (passed in pursuance of 1707, *c. 7. art. 19.*) that court is abolished, and a new court erected, consisting of the Lord High Treasurer of Great Britain, and a chief Baron, with four other Barons of Exchequer ; which Barons are to be made of serjeants at law, English barristers, or Scots advocates of five years standing. All the privileges belonging to the college of Justice are communicated to the Barons and other members of this court, and the council entitled to practise in it are such as can practise before the courts of Westminster, or the court of Session. This court has a private jurisdiction conferred upon it, as to the duties of customs, excise, or other revenues appertaining to the King or Prince of Scotland, and as to all honours and estates that may accrue to the crown ; in which matters, they are to judge by the forms of proceeding used in the English court of Exchequer, under the following limitations ; that no debt due to the crown shall affect the debtor's real estate in any other manner than such estate may be affected by the laws of Scotland, (see *New Coll.* 112.), and that the validity of the Crown's titles to any honours or lands shall continue to be tried by the court of Session. The Barons have the powers of the Scots court transferred

transferred to them, of passing the accounts of sheriffs, or other officers who have the execution of writs issuing from, or returnable to the Court of Exchequer, and of receiving resignations, and passing signatures of charters, gifts of casualties, &c. But though all these must pass in Exchequer, it is the Court of Session only who can judge of their preference, after they are completed, 1661, c. 57. See *Stair's Decis.* 14. *June* 1665.

18. The jurisdiction of the admiral in maritime causes, was, of old, concurrent with that of the Session. It has the title of Sovereign given to it by 1609, c. 15. and is much enlarged by 1681, c. 16. whereby the high-admiral is declared the King's Justice General upon the seas, on fresh water within the flood mark, and in all harbours and creeks. His civil jurisdiction extends, by this statute, to all maritime causes, and so comprehends questions of charter-parties, freights, salvages, bottomries, &c. He exercises his supreme jurisdiction by a delegate, the Judge of the High Court of Admiralty; and he may also name inferior deputies, whose jurisdiction is limited to particular districts, and whose sentences are subject to the review of the High Court. In causes which are declared to fall under the admiral's cognisance, his jurisdiction is sole; insomuch that the Session itself, though they may review his decrees by suspension or reduction, cannot carry a maritime question from him by advocacy: Yet the Session may advocate causes from inferior admiralties, in order to remit them to the Judge of the High Court. The Admiral has acquired, by usage, a jurisdiction in mercantile causes,
E
even

Admiral,
his jurisdiction;

criminal,

and civil.

even where they are not strictly maritime, cumulative with that of the Judge Ordinary, 19. July 1706, *Turnbull* *. The jurisdiction of the Commissaries of Edinburgh, which is as properly supreme as that of the High Admiral, is explained below, 1. 5. 24. 25.

Seals of
court.

19. All our supreme courts have seals or signets, proper to their several jurisdictions. The Courts of Session and Justiciary used formerly the same signet, which was called the King's, because the writs issuing from thence run in the King's name; and though the Justiciary got at last a separate signet for itself, yet that of the Session still retains the appellation of the *King's Signet*. In this office are sealed summonses for citation, letters of executorial diligence, or for staying or prohibiting of diligence, and generally whatever passes by the warrant of the Session, and is to be executed by the officers of the court. All these must, before sealing, be signed by the writers, or, as they are called in our antient statutes, 1537, c. 59. *et seqq.* clerks of the signet: But letters of diligence, where they are granted in a depending process, merely for probation, though they pass by the signet, must be subscribed by a clerk of Session. The clerks of the signet also prepare and subscribe all signatures of charters, or other royal grants, which pass in Exchequer. An account of the several seals under which grants by the Crown ought to pass, shall be given below, 2. 5. 38. *et seqq.*

TIT.

* But admiral-deputes have no jurisdiction in causes merely mercantile, Haig and Co. *contra* Campbell, July 1768.

TIT. 4. *Of the inferior Judges and Courts of
SCOTLAND.*

SHERIFF, from *reeve*, governor, and *sheer*, Sheriff; to cut or divide, is the judge-ordinary constituted by the Crown over a particular division or county. Our kings sometimes erected certain lands, which were only parts of a county, and at other times royal boroughs, with the jurisdiction of sheriff-ship within themselves; in which case, the judge of the privileged territory had a jurisdiction, cumulative with the jurisdiction of the sheriff of that county, within which it was locally situated. The sheriff's jurisdiction, both civil and criminal, was, in ancient times, nearly as ample within his own territory, as that of the supreme Courts of Session and Justiciary was over the whole kingdom; for he received in his court the four pleas of the Crown, murder, robbery, rape, and fire-raising, when authorised by the Justiciar, *St. Gul. c. 2. §. 5.* and he judged in declarators of property or pleas of right, and in other questions of the greatest importance, *R. M. l. 1. c. 3. et 5.* And, even after his jurisdiction came to be more limited, it retained for some time this mark of supreme, that causes were carried for review from the baron courts of subject-superiors, to the sheriff-court, as the King's baron-court, 1503, c. 95.

2. The sheriff, to this day, judges in all actions upon contracts, or other personal obligations, to the greatest extent, whether the suit be brought against the debtor himself, or against his representative, in forth-comings, in poindings as it stands
at present;

ings of the ground, in mails and duties, and in all possessory actions, as removings, ejections, spulzies, &c. ; in all briefes issuing from the chancery, as of inquest, terce, division, tutory, &c. ; and even in adjudications of land-estates, when proceeding on the renunciation of the apparent heir. His present criminal jurisdiction extends to certain capital crimes, as theft, and even murder, though it be one of the pleas of the Crown, 1426, c. 90.—1491, c. 28. ; and he is competent to most questions of public police, and has a cumulative jurisdiction with justices of the peace in all riots and breaches of the peace.

His ministerial powers.

3. Sheriffs have a ministerial power, in virtue of which they were antiently employed in sending written copies of the law to prelates, barons, and boroughs, before the art of printing, 1425, c. 67. ; and to this day they return juries, in order to the trial of causes that require juries. The writs for electing members of Parliament have been, since the Union, directed to the sheriffs, who, after they are executed, return them to the crown-office from whence they issued. They also execute writs issuing from the Court of Exchequer : And, in general, take care of all estates, duties, or casualties that fall to the Crown within their territory, for which they must account to the Exchequer.

Lord of regality ;

4. A lord of regality was a magistrate, who had a grant of lands from the Sovereign, with royal jurisdiction annexed thereto. No lands could be comprehended under this grant, which did not belong, either in property or superiority, to the grantee. His civil jurisdiction was equal to that of a sheriff ; his criminal extend-
ed

ed to the four pleas of the Crown; for it was equal to that of the Justiciary, as to every crime except treason, *Mack. Crim. Jurisd. of regal.*

§ 1. 5. He had a right to repledge or reclaim all criminals, subject to his jurisdiction, from any other competent court, though it were the Justiciary itself, to his own; at least till 1672, *c. 16.* He who used this right was obliged to give caution to the court from whom the criminal was repledged, that justice should be ministered by himself; in which, if he failed, he forfeited his right of holding courts for a year, and the first judge might again take up the cause; and if the delinquent did not appear, the cautioner or security was to answer for him,

His right of repledging;

Q. Att. c. 8. § 6. 7. He had also right, according to the most common opinion, to the single escheat of all denounced persons residing within his jurisdiction, even though such privilege had not been expressed in the grant of regality. As this ample jurisdiction was attended with too great power and influence, a stop was put to farther grants of regality, without consent of Parliament, by 1455, *c. 43.*; notwithstanding which, our Sovereigns continued to make new grants, that, for the greatest part, were either confirmed by ratifications of Parliament, or fortified by the immemorial exercise of the jurisdiction.

his right to the single escheat of delinquents.

5. The Stewart was the magistrate appointed by the King over such regality lands as happened to fall to the Crown by forfeiture, &c.; and therefore the stewart's jurisdiction was equal to that of a regality. The two stewartries of Kirkcudbright, and of Orkney and Zetland, make shires or counties by themselves, and send each

Stewart.

Bailie.

All heritable jurisdictions are now dissolved.

Sheriffs may hold courts any where within the shire:

But diligences must be published at the head-borough.

each a representative to Parliament. Where lands, not erected into a regality, fell into the King's hands, he appointed a bailie over them, whose jurisdiction was equal to that of a sheriff.

6. By the late jurisdiction act, 20. *Geo. II.* all heritable regalities and baileries, and all such heritable sheriff-ships and stewartries, as were only parts of a shire, are dissolved; and the powers formerly vested in them are made to devolve upon such of the King's court, as these powers would have belonged to, if the jurisdictions dissolved had never been granted. All sheriff-ships and stewartries that were no parts of a shire, where they had been granted either heritably or for life, are resumed and annexed to the Crown. No high sheriff or steward can hereafter judge personally in any cause. One sheriff or steward-depute is to be appointed by the king in every shire, who must be an advocate of three years standing; and after a certain term not yet expired, all commissions to these deputies are to be granted for life.

7. Formerly, the jurisdiction of sheriff must have been exercised at the head borough of the shire; but, by the foresaid act, sheriffs and stewards-depute have a power to name a substitute or substitutes during pleasure, either over the whole shire, or within such a particular district as shall be mentioned in the substitution; and they may hold courts at any place within the shire, upon previous notice, to be published at the several churches within the district where the court is to be held. After this statute, several diligences continued to be executed at the head-boroughs of regalities and stewartries, though there could not possibly be any record kept

kept in these abolished jurisdictions, in which diligences might be registered; such executions were therefore prohibited by *Act. S. 29. Feb. 1752.* No sheriff could have sat, by our former law, during the vacation of the Session, without a dispensation from the Lords, until Michaelmas head-court, which was considered as the beginning of the sheriff's session; but, by this statute, sheriff-deputies and their substitutes may sit at all times, and in all causes, without dispensation.

8. The appanage, or patrimony of the Prince of Scotland, has been long erected into a regality jurisdiction, called the principality. It is personal to the King's eldest son, upon whose death or succession it returns to the Crown. The Prince has, or may have, his own chancery, from which his writs issue, and may name his own chamberlain and other officers for receiving and managing his revenue. The vassals of the Prince are entitled to elect, or to be elected members of Parliament for counties, equally with those who hold of the crown.

9. Justices of the peace are magistrates named by the Sovereign over the several counties of the kingdom, for the special purpose of preserving the public peace. Their power by 1609, c. 7. reached little farther than to bind over disorderly persons for their appearance before the Privy Council or Justiciary; but, by 1617, c. 8. and 1661, c. 38. they are specially directed to judge in breaches of the peace, and in most of the laws concerning public policy. They may compel workmen or labourers to serve for a reasonable fee, and they can condemn masters in the wages due to their servants, which is the only

Prince of
Scotland.

Justices of
the peace.

The ex-
tent of
their pre-
sent juris-
diction.

only point of civil jurisdiction given them by these statutes. By 1669, *c.* 16. they have power to judge in questions of high-ways, which must be twenty feet broad at least, excluding the ditches on both sides; to call out the tenants with their cottars and servants, to perform six days work yearly for upholding them; and, in conjunction with the heritors, to assess the shire in the sum necessary for that purpose, and for building and repairing bridges, not exceeding 10*s.* upon every L. 100 Scots of valuation; part of which may be applied, where a high-way is to be made upon new ground, to compensate the loss of the proprietor, through whose ground the new road is to be carried. But the commissioners of supply are now joined with the justices in that part of their jurisdiction, 5. *Geo.* I. *c.* 29*.

Their
powers of
holding
courts.

10. To prevent collusion between justices of the peace and other judges, they are enjoined not to cite any party to their court, till fifteen days are expired from his committing the offence. The act 1661 ordains them to meet four times in the year, with power to continue or adjourn these quarterly meetings to such day and place as shall be most convenient; but they hold common courts at any time, and in any place within the shire, though not by way of adjournment of the quarter-sessions. In the quarter-sessions, which are always held at the head-borough of the county, the justices have, in the common case, been in use of reviewing the sentences pronounced in their intermediate meetings,

* The act 11. *Geo.* III. *c.* 53. appoints two general yearly meetings, for the business of the high-ways.

meetings, which are frequently called special sessions. Constables are the proper officers for Constables. executing their orders. They have powers, by the act above cited, to suppress tumults with the assistance of the neighbourhood; and to apprehend delinquents, and those who can give no good account of themselves, and carry them to the next justice. Any one justice may, by proper warrants of commitment, imprison delinquents in order to trial, or, by a warrant to a constable, ordain suspected houses to be searched, and suspected persons to be brought before him, in order to their examination, or to give security for their good behaviour.

11. By 6. *An. c. 6.* our justices of the peace, The over and above the powers committed to them by the laws of Scotland, are authorised to exercise whatever belonged to the office of an English justice of the peace, in relation to the public peace. From that time, the Scots and the English commissions have run in the same style, which contain powers to inquire into, and judge in all capital crimes, witchcrafts, felonies, and several others specially enumerated, with this limitation subjoined, *Of which justices of the peace may lawfully inquire:* But, in cases of difficulty, they shall not proceed, unless one of the King's judges be present; which, when applied to our law, must signify one of the Lords of Justiciary. These commissions bear, that two justices shall make a quorum in the trial of crimes, &c. And, therefore, though by the laws of Scotland three were required, and though, by the above quoted act 6. *An.* the forms of trial were to continue as formerly, two justices can now constitute a court,

Dec. 1730, Reid. Special statute has given the cognifance of feveral matters of excife to the Juftices, in which their fentences are final. See 25. *Jan. 1710, Paterfon.*

Boroughs. 12. A borough is a body corporate, made up of the inhabitants of a certain tract of ground erected by the Sovereign, with Jurisdiction annexed to it. Boroughs are erected, either to be holden of the Sovereign himfelf, which is the general cafe of royal boroughs; or of the fuperior of the lands erected, as boroughs of regality and barony. Boroughs-royal have power, by their charters, to chufe annually certain office bearers or magiftrates; and, in boroughs of regality and barony, the nomination of magiftrates is, by their charter, lodged, fometimes in the inhabitants, fometimes in the fuperior. Bailies of boroughs have jurifdiction in matters of debt, fervices, and queftions of poffeffion betwixt the inhabitants. Their criminal jurifdiction extends to petty riots; and, by fpecial ftatute, to recklefs (not intended) fire-raifing, 1426, *c.* 75. Boroughs-royal had antiently the fame privilege with regalities, of repledging from the Jufticiary or Sheriff; for which fee *L. B. c.* 61. § 1. and 1488, *c.* 1.

Dean of Guild. The Dean of Guild is that magiftrate of a royal borough, who is head of the merchant-company; he has the cognifance of mercantile caufes within borough, 1593, *c.* 180.; and the infpection of buildings, that they incroach, neither on private property, nor on the public ftreets; and he may direct infufficient houfes to be pulled down. His jurifdiction has no dependence on the court of the borough, or bailie-court, 21. *July 1631, Adamfon.* By the late

late jurisdiction-act, all jurisdiction, competent to any borough of regality, or barony, or magistrates thereof, which is independent of the Lord of regality or barony, is reserved intire; but their privilege of repledging from the Sheriff and Stewart-courts is taken away.

13. A Baron, in the large sense of that word, Barons. is one who holds his lands immediately of the Crown; and, as such, had by our ancient constitution, right to a seat in parliament, however small his freehold might have been. When titles of honour and dignity came to be conferred by the Sovereign, the Barons that were distinguished by these had the appellation of Barons majores et minores. *Majores*. By 1427, c. 102. the lesser Barons were exempted from the burden of attending the service of parliament, provided that commissioners were sent from the Barons of each county to represent them. This exemption, Lesser Barons excluded from parliament, if not elected. which was renewed under certain restrictions by 1457, c. 75. and 1503, c. 78 grew insensibly, in less than a century, into an utter disability in all the lesser Barons from sitting in parliament, without election by the county; though no statute is to be found expressly excluding them; See 1587, c. 113.

14. To constitute a Baron in the strict law-Their jurisdiction, sense, his lands must have been erected, or, at least, confirmed by the King *in liberam baroniam*; and such Baron had a certain jurisdiction, both civil and criminal, which he might have exercised, either in his own person, or by his bailie; but where he himself was a party, he could not judge in person. In civil matters, he Civil, might have judged in questions of debt within the barony, and in most of the possessory actions;

and criminal :

tions ; he had also a power of police, by which he could fix reasonable prices on work, &c. and he was competent to every question necessary for making his own rents effectual. His criminal jurisdiction extended antiently to all crimes, except treason and the four pleas of the crown, robbery, murder, rape, and fire-raising, *Eg. Milc. II. c. 13.* He might, by our later practice, have judged in reckless fire-raising, 1426. *c. 75.* ; in penal statutes, 3. *Feb. 1674, L. Strowan*, and in riots and bloodwits : And, in the general opinion of lawyers, every Baron, as such, could have punished the crime of theft capitally, *Cr. 105. § 16.—Skene, de verb. sig. voce Baron,—H. Min. Pr. 93.*

How restricted by
20 Geo. II.
c. 43.

15. By the late jurisdiction-act, the civil jurisdiction of a Baron is reduced to the power of recovering, from his vassals and tenants, the rents of his lands, and of condemning them in mill-services ; and of judging in causes where the debt and damages do not exceed 40s. Sterling. His criminal jurisdiction is, by the same statute, limited to assaults, batteries, and other smaller offences, which may be punished by a fine, not exceeding 20s. Sterling, or by setting the offender in the stocks in the day time, not above three hours : The fine to be levied by poinding, or one month's imprisonment. The jurisdiction formerly competent to proprietors of mines, and coal or salt-works, over their workmen, is reserved ; and also that which was competent to proprietors who had the right of fairs or markets, for correcting the disorders that might happen during their continuance ; provided they shall exercise no jurisdiction inferring the loss of life or demembration. No charter

charter to be hereafter granted for erecting lands into a barony, is to convey any greater jurisdiction than for recovery of rents and for mill-services; which is a right that every proprietor, though neither baron nor infest *cum curiis*, was understood to have by our former law. The jurisdictions of Sheriff-ship, Stewartry, and Barony, had certain stated head-courts yearly, at which all the vassals subject to the jurisdiction were obliged to attend; but this obligation is taken off by act 20. *Geo. II. c. 50.* for abolishing tenures by ward-holding.

How future erections are restricted.

Attendance at head-courts abolished.

16. The High Constable of Scotland had no fixed territorial jurisdiction, but followed the court; and had, jointly with the Marischal, the cognisance of all crimes committed within two leagues of it, *Leg. Milc. II. c. 6.* All other constabularies were dependent on him: These had castles, and sometimes boroughs subject to their jurisdiction, as Dundee, Montrose, &c.; and amongst other powers, now little known, they had the right of exercising criminal jurisdiction within their respective territories during the continuance of fairs, 18. *July 1676, E. Kinghorn.* By the late jurisdiction-act, all jurisdictions of constabulary are dissolved, except that of high constable.

Constabularies.

17. The office of the Lyon King of arms was chiefly ministerial, to denounce war, proclaim peace, carry public messages, &c. But he has also a right of jurisdiction, 1592, *c. 125.* whereby he can punish all who usurp arms, contrary to the law of arms, and deprive or suspend messengers, heralds, or pursuivants, (who are officers named by himself); but he has no cognisance of the damage arising to the private party

Lyon K. of arms.

Messen-
gers.

party through the messenger's fault, 27. *June* 1673, *Heriots*. Messengers, antiently called officers at arms, were first brought under regulations by 1587, *c.* 46. They are subservient to the supreme Courts of Session and Justiciary; and their proper business is to execute all the King's letters, either in civil or criminal causes.

Sentence
money.

18. Our judges had, for a long time, no other salaries or appointments, than what arose from the sentences they pronounced. Our criminal judges applied to their own use, the fines or issues of their several courts; and regalities had a right to the single escheat of all persons denounced, who resided within their jurisdiction. A small sum was allowed to our supreme civil court, upon every decree, by 1457, *c.* 63.; and afterwards, the twentieth part also of the sums decreed, 1587, *c.* 43.; and it was not, till after certain yearly provisions were settled on the Lords, (for which see 1609, *c.* 11. and 1633, *c.* 22.), that sentence-money was prohibited, 1641, *c.* 55. which has never since been exacted, 1661, *c.* 50. Sheriffs were likewise entitled to the twentieth part of the sum contained in every decree, in name of Sheriff-fee; both proper Sheriffs, 1491, *c.* 30, and Messengers, when invested with the power of Sheriffs, 1503, *c.* 66.; but, by the late jurisdiction act, fixed salaries were settled upon Sheriffs-depute in place thereof. Messengers, when employed in poindings, are still entitled to their Sheriffs-fee, which they usually assign to the creditor, on getting a reasonable allowance for their trouble.

Sheriff
fee.

TIT. 5. *Of Ecclesiastical Persons.*

THE Pope, or Bishop of Rome, was long acknowledged, over the western part of Christendom, for the head of the Christian church. The papal jurisdiction was first abolished in Scotland, *anno* 1560, in a parliament not regularly authorised by the Sovereign; and afterwards, by 1567, *c.* 2. The King was, by 1669, *c.* 1. declared to have supreme authority over all persons, and in all causes ecclesiastical; but this act was repealed by 1690, *c.* 1. as inconsistent with presbyterian church-government, which was then upon the point of being established.

2. Before the reformation from Popery, the clergy was divided into secular and regular. The secular had a particular tract of ground given them in charge, within which they exercised the pastoral office of Bishop, Presbyter, or other church-officer. The regular clergy had no cure of souls, but were tied down to residence in their abbacies, priories, or other monasteries: And they got the name of regular, from the rules of mortification to which they were bound, according to the institution of their several orders. Upon the vacancy of any benefice, whether secular or regular, commendators were frequently appointed to levy the fruits, as factors or stewards during the vacancy. The Pope alone could give the higher benefices *in commendam*; and at last, from the plenitude of his power, he came to name commendators for life, and without any obligation to account. After the reformation, several abbacies and priories

priorities were given by James VI. *in perpetuam commendam*, to laicks.

Church
govern-
ment
since the
reforma-
tion.

3. Upon abolishing the Pope's authority, the regular clergy was totally suppressed; and, in place of all the different degrees which distinguished the secular clergy, we had at first only parochial presbyters or ministers, and superintendants who had the oversight of the church within a certain district: Soon thereafter the church-government became episcopal, by archbishops, bishops, &c. 1606, c. 2.; and, after some intermediate turns, is now presbyterian, by kirk-sessions, presbyteries, synods, and general assemblies, 1689, c. 3.—1690, c. 5.

Prelates,
Bishops,
and Chap-
ters.

4. Prelate, in our statutes, signifies a bishop, abbot, or other dignified clergyman, who in virtue of his office had a seat in parliament. Every bishop had his chapter (*capitulum*), which consisted of a certain number of the ministers of the diocese, by whose assistance the bishop managed the affairs of the church within that district. The nomination of bishops to vacant sees has been in the crown since 1540, c. 125. though under the appearance of continuing the antient right of election, which was in the chapter. The confirmation by the crown under the great seal of the chapter's election, conferred a right to the spirituality of the benefice; and a second grant, upon the consecration of the bishop-elect, gave a title to the temporality, 1617, c. 1.; but this second grant fell soon into disuse.

Nomina-
tion of
Bishops
was in
the
crown.

Patron.

5. He who founded or endowed a church was entitled to the right of patronage thereof, or *advocatio ecclesiae*; whereby, among other privileges, he might present a churchman to the

the cure, in case of a vacancy. The presentee, after he was received into the church, had a right to the benefice, *proprio jure*; and, if the church was parochial, he was called a parson.

The Pope claimed the right of patronage of every kirk, to which no third party could shew a special title; and, since the reformation, the crown, as coming in place of the Pope, is considered as the universal patron, where no right of patronage appears in a subject. Where two churches are united, which had different patrons, each patron presents by turns, 1617, c. 3. § 3.

Who patron of kirks.

6. Gentlemen of estates frequently founded colleges or collegiate churches, the head of which got the name of Provost, under whom were certain prebendaries or canons, who had their several stalls in the church, where they sung masses. Others of lesser fortunes founded chaplainries, within the precincts of a parochial church; or altarages, which were donations granted for the singing of masses for deceased friends, at particular altars in a church. Though all these were suppressed upon the reformation, their founders continued patrons of the endowments; out of which they were allowed to provide bursars, to be educated in any of the universities, 1567, c. 12. As the residence of the bursars, who were truly the superiors of these benefices, and were dispersed over all the universities in Scotland, could hardly be discovered by the heirs who were to enter to the lands as their vassals, the right of entering vassals to these lands was, by 1661, c. 54. given to the patron.

Patrons of provostries and chaplainries.

Their endowments now given to bursars

7. Where a fund is gifted for the establishment of a second minister, in a parish where the

Patrons of collegiate charges.

the cure is thought too heavy for one, the patronage of such benefice does not belong to the donor, but to him who was patron of the church, 18. *Nov.* 1680, *B. of Haddington*; unless either where the donor has reserved to himself the right of patronage in the donation, or where he and his successors have been in the constant use of presenting the second minister, without challenge from the patron, *P. Falc.* 42.

The right of presentation.

The right of presenting incumbents was, by 1690, *c.* 23. taken from patrons, and vested in the heritors and elders of the parish, upon payment to be made, by the heritors to the patron, of 600 merks; but it was again restored to patrons, 10. *An. c.* 12. with the exception of the presentations sold in pursuance of the former act.

Right of applying the vacant stipends.

8. Patrons were not simply administrators of the church; for they held the fruits of the vacant benefice as their own, for some time after the reformation, 1593, *c.* 172. &c. But that right is now no more than a trust in the patron, who must apply them to pious uses within the parish, at the sight of the heritors, yearly as they fall due. If he failed, he lost his right of presenting for the next turn, by 1685, *c.* 18.; and after that right was taken away, the penalty is, by 1690, *c.* 23. declared to be the forfeiture of his right of administering the vacant stipend for that and the next vacancy. The King, who is exempted from this rule by said act 1685, may apply the vacant stipend of his churches to any pious use, though not within the parish*. If one should be ordained to a church,

Penalty of not applying them.

* This confirmed by a judgment of the House of Lords, in the case of Dr. Dick, April 1753.

church, in opposition to the presentee, the patron, whose civil right cannot be affected by any sentence of a church court, may retain the stipend as vacant, *Falc. vol. 2. 213.* Patrons are, to this day, intitled to a seat and burial-place in the churches of which they are patrons; and the right of all the teinds of the parish, not heritably disposed, is given to them by 1690, c. 23.—1693, c. 25.

9. That kirks may not continue too long vacant, the patron must present to the presbytery, (formerly to the bishop), a fit person for supplying the cure, within six months from his knowledge of the vacancy, otherwise the right of presentation accrues to the presbytery, *jure devoluto*, 1567, c. 7.—10. *An. c. 12.* Upon presentation by the patron, the bishop collated or conferred the benefice upon the presentee, by a writing, in which he appointed certain ministers of the diocese, to induce or institute him into the church; which induction completed his right, and was performed by their placing him in the pulpit, and delivering him the Bible and the keys of the church. The bishop collated to the churches of which himself was patron, *pleno jure*, or without presentation; which he also did in menial churches whose patronages were sunk, by the churches being appropriated to him, as part of his patrimony. Since the Revolution, a judicial act of admission by the presbytery, proceeding either upon a presentation, or upon a call from the heritors and elders, or upon their own *jus devolutum*, completes the minister's right to the benefice.

10. Soon after the Reformation, the Popish churchmen were prevailed upon to resign in the Sovereign's Provision for the reformed clergy.

Sovereign's hands, a third of their benefices, which, by 1567, c. 10. was appropriated, in the first place, for the subsistence of the reformed clergy. To make this fund effectual, particular localities were assigned in every benefice, to the extent of a third, called the *assumption of thirds*; and for the farther support of ministers, Queen Mary made a grant in their favour of all the small benefices, not exceeding 300 merks; which was confirmed by 1572, c. 52. Bishops, by the act which restored them to the whole of their benefices, 1606, c. 2. were obliged to maintain the ministers within their diocesses, out of the thirds; and in like manner, the laick titulars, who got grants of the teinds, became bound, by their acceptation thereof, to provide the kirks, within their erections, in competent stipends.

Commis-
sion for
planting
kirks and
valuing
teinds,

and for
uniting
and dis-
joining
parishes,

now trans-
ferred to
the Ses-
sion.

11. But all these expedients for the maintenance of the clergy having proved ineffectual, a commission of Parliament was appointed in the reign of James VI. for planting kirks, and modifying stipends to ministers out of the teinds, 1617, c. 3. to which a power was soon superadded, of dividing large parishes, and erecting new churches, by 1621. c. 5. a second commission was appointed, 1633, c. 19. not only for modifying stipends, but for the valuation and sale of teinds. After the Restoration, several new commissions were granted by Parliament, with more ample powers of dismembering and annexing churches as they should find just, 1661, c. 61. &c.; but the powers of all these were, by 1707, c. 9. transferred to the Court of Session, with this limitation, that no parish should be disjoined, nor new church erected.

rected; nor old one removed to a new place, without the consent of three-fourths of the heritors, computing the votes, not by their numbers, but by the valuation of their rents within the parish. The Judges of Session, when sitting in that court, are considered as a commission of Parliament, and have their proper clerks, macers, and other officers of court, as such.

12. The lowest stipend that could be modified to a minister by the first commission 1617, *Maximum* and *minimum* of stipends. *c. 3.* was 500 merks, or five chalders of victual, unless where the whole teinds of the parish did not extend so far: And the highest was 1000 merks, or ten chalders. The Parliament, 1633, *c. 8.* raised the *minimum* to eight chalders of victual, and proportionally in silver; but as neither the commission appointed by that act, nor any of the subsequent ones, was limited as to the *maximum*, the commissioners have been in use to augment stipends, considerably above the old *maximum*, where there is sufficiency of free teinds, and the cure is burdensome, or living expensive.

13. Where a certain quantity of stipend is modified to a minister out of the teinds of a parish, without proportioning that stipend among the several heritors, the decree is called a *decree of modification*: But where the commissioners also fix the particular proportions payable by each heritor, it is a decree of *modification and locality*. Where a stipend is only modified, it is secured on the whole teinds of the parish, so that the minister can insist against any one heritor to the full extent of his teinds; such heritor being always entitled to relief against

Decree of modification and of locality.

How a modified stipend is secured.

gainst the rest, for what he shall have paid above his just share, 3. *Dec.* 1664, *Hutchison*. But where the stipend is also localled, each heritor is liable in no more than his own proportion.

Minister's
manse;

its ex-
pence;

who bur-
dened
with it.

Free
manse.

14. Few of the reformed ministers were, at first, provided with dwelling houses; most of the Popish clergy having, upon the first appearance of the Reformation, let their manse in feu, or in long tacks: Ministers, therefore, got a right, by 1563, *c.* 72. to as much of these manse as would serve them, notwithstanding such feus or tacks. Where there was no parson's nor vicar's manse, one was to be built by the heritors, at the sight of the bishop, (now the presbytery), the charge not exceeding L. 1000 Scots, nor below 500 merks, 1649, *c.* 45.—1663, *c.* 21. Under a manse are comprehended stable, barn, and byre, with a garden; for all which, it is usual to allow half an acre of ground. A person, whose only interest in the lands within the parish is a liferent-right, is to be burdened with no proportion of the charge in building a manse, 14. *Nov.* 1679, *minister of Moreham*; but he must bear his share in repairing it, because that has less of the nature of a perpetuity.

15. Every incumbent is entitled, at his entry, to have his manse put into good condition; for which purpose the presbytery may appoint a visitation by tradesmen, and order estimates to be laid before them, of the sums necessary for the repairing, which they may proportion among the heritors, according to their valuations; and letters of horning will, on bill to the Lords, be granted for carrying the presbytery's

tery's sentence into execution. The presbytery, after the manse is made sufficient, ought, upon application of the heritors, to declare it a free manse, which lays the incumbent under an obligation to uphold it in good condition, during his incumbency; otherwise, he or his executors shall be liable in damages; see 1612, c. 8: But they are not bound to make up the loss arising from the necessary decay of the building, by the waste of time.

16. All ministers, where there is any land-ward or country parish, are, over and above their stipend, entitled to a glebe, which comprehends four acres of arable land, or sixteen fowms of pasture ground, where there is no arable land, (a fowm is what will graze ten sheep or one cow), and is to be designed or marked by the bishop or presbytery, out of such kirk-lands within the parish as lie nearest to the kirk, 1593, c. 161.—1606, c. 7. As the benefit intended by these acts to the clergy must have been lost, where there were no kirk lands in the parish, it was provided, by 1644, c. 31. that, in default of kirk-lands, the glebe should be designed out of temporal lands; and this act, though falling under the act rescissory of Charles II. seems to have been considered as still in force by 1663, c. 21. which takes it for granted, that all ministers, except those in certain royal boroughs, have right to glebes; see *St.* 2. 3. 40.

17. A right of relief is competent to the heritors, whose lands are set off for the manse or glebe, against the other heritors of the parish, 1594, c. 199. The statute limits this right to heritors of kirk lands, and to the special case, Relief arising from the designation of a manse or glebe,

case, where the greatest part of the lands in a parish are kirk-lands. The foresaid act, 1644, which allowed designations out of temporal lands, extended the relief to the heritors of these lands: And, if the first part of that act, allowing such designations, has been received as our law since the Restoration, it may be justly thought, that the equitable quality annexed to it ought not to be rejected. This relief, though constituted by statute, is not real against the lands themselves; it is only personal, against those who were proprietors at the time of the designation, or their heirs, 24. *June* 1675, *Snow*. Manfes and glebes, being once regularly designed, cannot be feued or sold by the incumbent, in prejudice of his successors, 1572, c. 48. which is in practice extended even to the case where such alienation evidently appears profitable to the benefice.

is only
personal.

Glebes
and man-
fes unali-
enable.

Minister's
grafs.

18. Ministers, besides their glebe, were entitled to grafs for a horse and two cows, by 1649, c. 45. which is revived by 1663, c. 21.: And, if the kirk-lands, out of which the grafs may be designed, either lie at a distance, or are not fit for pasture, the heritors are to pay to the minister L. 20 Scots yearly, as an equivalent. Ministers have also freedom of foggage, pasturage, fewel, feal, divot, loaning, and free ish and entry, according to use and wont, 1593, c. 161.—1663, c. 21.: What these privileges are, must be determined by the local custom of the several parishes. Besides the above-mentioned burdens which are imposed upon heritors, the parishioners were obliged to provide communion cups and lavers, 1617, c. 6. and to repair the kirk and kirk-yard dykes, 1572, c. 54.

c. 54.—1597, c. 232. ; but these burdens are now, for the most part, undertaken by the heritors.

19. It sometimes happens, that lands lying at a distance from the kirk to which they originally belonged, are annexed to another nearer kirk, *quoad sacra*, or in so far as concerns the pastoral charge. Such lands continue, in all civil respects, part of the old parish; and consequently are liable in no proportion of the stipend, nor of the expence necessary for upholding the manse, or even the kirk of the parish to which the inhabitants constantly resort for divine service, *Falc. vol. 1. 274.*

20. The legal terms at which stipends become due to ministers, are Whitsunday and Michaelmas. If the incumbent be admitted to his church before Whitsunday, till which term the corns are not presumed to be fully sown, he has right to that whole year's stipend; and, if he is received after Whitsunday, and before Michaelmas, he is entitled to the half of that year; because, though the corns were sown before his entry, he was admitted before the term at which they are presumed to be reaped. By the same reason, if he dies or is transported before Whitsunday, he has right to no part of that year; if before Michaelmas, to the half; and if not till after Michaelmas, to the whole. The reason why the legal term in stipends is Michaelmas, and not Martinmas, as in liferents, arises from the different nature of the two rights. All kirk-benefices did originally, and are still accounted in law to consist of teinds, which were drawn by the churchmen at the cutting of the corns, which was seldom so late

Annexa-
tion *quoad
sacra.*

Terms of
payment
of stipend.

Michael-
mas, the
legal term
in stipends.

as Michaelmas ; but rents are not due by the tenant to the landlord till Martinmas at soonest, before which term, the corns are perhaps not fully brought into the barn yard.

Annat or
ann.

21. After the minister's death, his executors have right to the annat ; which, in the sense of the canon law, was a right reserved to the Pope, of the first year's fruits of every benefice. Upon a threatened invasion from England, *anno* 1547, the annat was given by our Parliament, notwithstanding this right in the Pope, to the executors of such churchmen as should fall in battle in defence of their country, *c.* 4. : But the word annat or ann, as it is now understood, is the right which law gives to the executors of ministers, of half a year's benefice, over and above what was due to the minister himself for his incumbency, 1672, *c.* 13. : So that, if the incumbent survives Whitsunday, his executors have the half of that year for the deceased's incumbency, and the other half as annat ; if he survive Michaelmas, they have that whole year for his incumbency, and the half of the next, in name of ann. This right was first introduced into our law upon a letter of James VI. desiring the bishops to make an act for that purpose, 19. July 1626, *E. Marisball.*

The nature of the
right.

22. The executors of a minister need make up no title to the ann by confirmation : Neither is the right assignable by the minister, or affectable with his debts, 1672, *c.* 13. ; for it never belonged to him, but is a mere gratuity given by law to those whom it is presumed the deceased could not sufficiently provide : And law has given it, without distinction, to the executors of all ministers, even where the stipend

is

is made up, not of teinds, but of the public revenue of a borough, or of a voluntary contribution, *Falc. vol. 1. 182.* The statute 1672 gives this right of ann expressly to *executors*: And if it were to be governed by the rules of succession in executory, the widow, in case of no children, would get one half, the other would go to the next of kin; and where there are children, she would be intitled to a third, and the other two thirds would fall equally among the children, 3. 9. 6. But the Court of Session, probably led by the general practice, have in this last case divided the ann into two equal parts, of which one goes to the widow, and the other among the children *in capita*, July 1747, children of *Macdermeit*.

How divided.

23. From the great confidence that was, in the first ages of Christianity, reposed in churchmen, dying persons frequently committed to them the care of their estates, and of their orphan children; but these were simply rights of trust, not of jurisdiction. The clergy soon had the address to establish to themselves a proper jurisdiction, not confined to points of ecclesiastical right, but extending to questions that had no concern with the church. They judged, not only in teinds, patronages, testaments, breach of vow, scandal, &c.; but in questions of marriage and divorce, because marriage was a sacrament; in tochers, because these were given in consideration of marriage; in all questions where an oath intervened, on pretence that oaths were a part of religious worship, *R. M. l. 1 c. 2.—l. 2. c. 38. § 5.—l. 3. c. 7. § 2.*; and in the deprivation of notaries, and the trial of those that used false instruments,

Jurisdiction of bishops.

Commis-
saries ;

1503, c. 64. As churchmen came, by the means of this extensive jurisdiction, to be diverted from their proper functions, they committed the exercise of it to their officials or commissaries: Hence the Commissary Court was called the Bishops Court, and *Curia Christianitatis*; it is also styled the Consistorial Court, from *consistory*, a name first given to the court of appeals of the Roman emperors, and afterwards to the courts of judicature held by churchmen.

by whom
named.

24. At the Reformation, all episcopal jurisdiction, exercised under the authority of the Bishop of Rome, was abolished, by an act 1560, ratified by 1567, c. 2. As the course of justice in consistorial causes was thereby stopped, Q. Mary, besides naming a commissary for every diocese, did, by a special grant mentioned in *Books S. 1. March 1563.4*, establish a new Commissary Court at Edinburgh, consisting of four Judges or Commissaries; which grant is ratified by an unprinted act, 1592, c. 25. This court is vested with a double jurisdiction; one diocesan, which is exercised in the special territory contained in the grant, viz. the counties of Edinburgh, Haddington, Linlithgow, Peebles, and a part of Stirling-shire; and another universal, by which the judges confirm the testaments of all who die in foreign parts, and may reduce the decrees of all inferior commissaries, provided the reduction be pursued within a year after the decree: See *Instr. to Comm. 1666, c. 16*. cited in *Acts S. 28 Feb. 1666*. Bishops, upon their re-establishment in the reign of James VI. were restored to the right of naming their several commissaries, by 1609, c. 6.; and as to the commissariot

Commis-
saries of
Edin-
burgh.

Their
two-fold
jurisdic-
tion.

commissariat of Edinburgh, two of the four judges were, by that act, to be appointed by the Archbishop of St. Andrew's, and two by the Archbishop of Glasgow. Since the Revolution, the nomination of all the commissaries in the kingdom has devolved on the Crown, as coming in place of the bishops. There was but one commissary court in each diocese, till the erection of the Commissariat of Edinburgh; and in pursuance of a commission by James VI. in 1581, authorising the Session to erect new ones, for the benefit of persons who lived most remote from the court of the diocese, commissariots were established at Stirling, Peebles, Lauder, and other places, which had never been episcopal sees.

25. As the clergy, in times of popery, assumed a jurisdiction, independent of the civil power, or any secular court, their sentences could be reviewed only by the Pope, or judges delegated by him; so that, with regard to the courts of Scotland, their jurisdiction was supreme. But, by an act 1560, ratified by 1581, c. 115. the appeals from our bishop courts, that were then depending before the Roman consistories, were ordained to be decided by the Court of Session. And by a posterior act 1609, c. 6. the Session is declared the King's great Consistory, with power to review all sentences pronounced by the Commissaries. Nevertheless, since that court had no inherent jurisdiction in consistorial causes, prior to this statute; and since the statute gives them a power of judging, only by way of advocacy, they have not, to this day, any proper consistorial jurisdiction in the first instance, *St. 4. 1. 36.*; neither

Jurisdiction of commissaries originally supreme.

Now subject to the review of the Session.

ther do they pronounce sentence in any consistorial cause brought from the Commissaries, but remit it back to them with instructions. By the practice immediately subsequent to the act before quoted, they did not admit advocations from the inferior commissaries, till the cause was first brought before the Commissaries of Edinburgh; but that practice is now in disuse, *Edg.* 28. *Jan.* 1725, *White.*

Extent of
the Com-
missaries
jurisdic-
tion.

26. The Commissaries retain to this day an exclusive power of judging in declarators of marriage, and of the nullity of marriage; in actions of divorce and of non-adherence, of adultery, bastardy, and confirmation of testaments; because all these matters are still considered to be properly consistorial. Inferior commissaries are not competent to questions of divorce, 1609, c. 6. under which are comprehended questions of bastardy and adherence, when they have a connection with the lawfulness of marriage, or with adultery; See *Instr. to Comm.* 1666, c. 2.

Now li-
mited by
a late re-
gulation.

27. The bishops did, by these instructions in 1666, authorize their commissaries to judge in all causes referred to oath, to the extent of L. 40 Scots, though the matter should not be consistorial: And by older instructions, 1563-4, preserved by *Balf.* 655. the Commissaries were empowered to determine the causes of widows, orphans, and other *Personae miserales*, not exceeding L. 20 Scots. This part of their jurisdiction is now fixed, by *Act. S.* 29. *July* 1752, declaring that the Commissaries have no power to pronounce decrees in absence for any sum above L. 40 Scots, except in causes properly consistorial; but that they may authenticate tu-
torial

torial and curatorial inventories; and that all bonds, contracts, &c. which contain a clause for registration in the books of any judge competent, and protests on bills, may be registered in their books. Long before this act of federunt, commissaries had been judged not competent to physicians fees, 26. Nov. 1622, *Liddel*; nor to tutory accounts, 8. Dec. 1675, *Wright*; though they claimed the cognisance of them, as the causes of dying persons, and of orphans.

TIT. 6. Of Marriage.

PERSONS, when considered in a private capacity, are chiefly distinguished by their mutual relations; as husband and wife, tutor and minor, father and child, master and servant. The relation of husband and wife is constituted by marriage, which is the conjunction of man and wife, vowing to live inseparably till death.

2. Marriage is truly a contract, and so requires the consent of parties. Ideots, therefore, and furious persons, cannot marry. As no person is presumed capable of consent within the years of pupillarity, which, by our law, lasts till the age of fourteen in males, and twelve in females, marriage cannot be contracted by pupils, *l. 3. C. quando tut. vel cur.*; but if the married pair shall cohabit after puberty, such acquiescence gives force to the marriage, *l. 4. de rit. nupt.* Marriage is fully perfected by consent; which, without consummation, founds all the conjugal rights and duties. The consent

which
must be
de praesenti.

Form of
celebra-
tion:

Prefumed
marriage.

Consent of
parents.

Marriage
within
forbidden
degrees
null;

sent requisite to marriage must be *de praesenti*. A promise of marriage, (*stipulatio sponsalitia*), though it was guarded by certain penalties in the Roman law, *l. 5. C. de spons.* may, by ours, be safely refiled from, as long as matters are entire; but, if any thing be done by one of the parties, whereby a prejudice arises from the non-performance, the party refiling is liable in damages to the other, *F. 2. Jan. 1685, Graeme*. The canonists, and after them our courts of justice, explain a *copula* subsequent to a promise of marriage into actual marriage, *New Coll. 46*.

3. It is not necessary that marriage should be celebrated by a clergyman. The consent of parties may be declared before any magistrate, or simply before witnesses: And though no formal consent should appear, marriage is presumed from the cohabitation, or living together, at bed and board, of a man and woman who are generally reputed husband and wife, *1503, c. 77*. One's acknowledgement of his marriage to the mid-wife, whom he called to his wife, and to the minister who baptized his child, was found sufficient presumptive evidence of marriage, without the aid either of cohabitation, or of *habite and repute*, *Feb. 1739. Arrot*. The father's consent was, by the Roman law, essential to the marriage of children *in familia*: But, by our law, children may enter into marriage without the knowledge, and even against the remonstrances of a father.

4. Marriage is forbidden within certain degrees of blood. The Romans reckoned a degree for every person generated: By which rule, a father and son are in the first; brothers in the second, and first cousins in the fourth degree

degree of consanguinity. The canon law computes by the persons generated upon one side only, which, in the direct line of ascendants and descendants, comes to the same account with the Roman computation; but, in the transverse or collateral line, makes a considerable variation from it. By 1567, c. 15. which adopts the law of Moses, *Levit. c. 18.* into ours, seconds in blood, and all remoter degrees, may lawfully marry. By seconds in blood, are meant first cousins, according to the computation of the canon law, which was at that time the common way in Scotland of reckoning degrees. Marriage in the direct line is forbidden *in infinitum*; as it is also in the collateral line, in the special case where one of the parties is *loco parentis* to the other, as grand-uncle, great grand-uncle, &c. with respect to his grand niece, &c. The same degrees that are prohibited in consanguinity, are prohibited in affinity; which is the tie arising from marriage, betwixt one of the married pair, and the blood relations of the other. Marriage also, where either of the parties is naturally unfit for generation, or stands already married to a third person, is *ipso jure*, null.

5. To prevent bigamy and incestuous marriages, the church has introduced proclamation of banns; which is the ceremony of publishing the names and designations (additions) of those who intend to intermarry, in the churches where the bride and bridegroom reside, after the congregation is assembled for divine service; that all persons, who know any objection to the marriage, may offer it. Not Bishops only, but Presbyteries, assumed formerly a power of dispensing

Clandestine marriage.

penfing of proclamation of banns on extraordinary occasions, *Act. Aff.* 1638, *Seff.* 23. § 21. which has not been exercifed fince the Revolution. When the order of the church is obferved, the marriage is called regular; when otherwife, clandestine. Clandestine marriage, though it be valid, has ftatutory penalties annexed to it, affecting not only the parties, but the celebrator and witneffes, 1661, *c.* 34.—1695, *c.* 12.—1698, *c.* 6.: And over and above, the parties were punifhed with the lofs of certain conjugal rights; the husband loft his *jus mariti*, and the wife her *jus relictae*, by 1672, *c.* 9. This laft act, which alfo inflicted penalties againft the then non-conforming clergy, was refcinded in the lump with other acts for conformity, by 1690, *c.* 27.; in refpect of which, the penalties of the act 1672, againft clandestine marriages, were found to be taken off, *F.* 11. *Dec.* 1705, *Carruthers*.

Communion of goods.

6. By marriage, a fociety is created between the married pair, which draws after it a mutual communication of their civil interefts, in as far as is neceffary for maintaining it. As the fociety lafts only for the joint lives of the *focii*; therefore rights that have the nature of a perpetuity, which our law ftiles heritable, are not brought under the partnership or communion of goods; as a land-efate, or bonds bearing a yearly intereft: It is only moveable fubjects, or the fruits produced by heritable fubjects during the marriage, that become common to man and wife.

Jus mariti.

7. The husband, as the head of the wife, has the fole right of managing the goods in communion, which is called *jus mariti*. This right

right is so absolute, that it bears but little resemblance to a right of administering a common subject; for the husband can, in virtue thereof, sell, or even gift at his pleasure, the whole goods falling under communion; and his creditors may affect them for the payment of his proper debts: So that the *jus mariti* carries all the characters of an assignation by the wife to the husband, of her moveable estate. It arises *ipso jure* from the marriage; and therefore needs no other constitution. Our lawyers of the last age were of opinion, that this was a right so inseparable from the husband that all reservation by the wife of the right of administration, or renunciation of it by the husband, was ineffectual; for that such reservation or renunciation, as a moveable right conceived in favour of the wife, fell under the *jus mariti*: But it is now an agreed point, not only that a stranger may convey an estate to a wife, so as it shall not be subject to the husband's administration, but that a husband may, in the marriage contract, renounce his *jus mariti* in all or any part of his wife's moveable estate, 23d June 1730, *Walker* *.

8. From this right are excepted paraphernal goods, which, as the word is understood in our law, comprehends the wife's wearing apparel, and the ornaments proper to her person, as necklaces, ear rings, breast or arm jewels, buckles, &c. These are neither alienable by the husband, nor affectable by his creditors. Things of promiscuous use to husband and wife, as plate, medals, &c. may become paraphernal, by.

* *Falc. and Kirkerran*, 5. Feb 1745, *Murray*.

by the husband's giving them to the wife, at or before marriage; but they are paraphernal, only in regard to that husband who gave them as such and are esteemed common moveables, if the wife, whose *paraphernalia* they were, be afterwards married to a second husband; unless he shall in the same manner appropriate them to her, *F. 4. Dec. 1696, and 15th Jan. 1697, Dicks.*

Burdens
affecting
the *jus*
mariti.

How re-
stricted in
favour of
the hus-
band.

9. The right of the husband to the wife's moveable estate, is burdened with the moveable debts contracted by her before marriage: And, as his right is universal, so is his burden; for it reaches to her whole moveable debts, though they should far exceed her moveable estate. Yet the husband is not considered as the true debtor in his wife's debts. In all actions for payment she is the proper defender; the husband is only cited for his interest, that is, as curator to her, and administrator of the society-goods: As soon therefore as the marriage is dissolved, and the society-goods thereby suffer a division, the husband is no farther concerned in the share belonging to his deceased wife; and consequently is no longer liable to pay her debts, which must be recovered from her representatives, or her separate estate.

How ex-
tended a-
gainst the
husband.

10. This obligation upon the husband is perpetuated against him. 1. Where his proper estate, real and personal, has been effected, during the marriage, by compleat legal diligence; in which case, the husband must, by the common rules of law, relieve his property from the burden with which it stands charged: But the utmost diligence against his person is not sufficient to perpetuate the obligation, *Had. 26.*

Feb,

Feb. 1623, *Douglas*; nor even in complete diligence against his estate, 23. Jan. 1678, *Wilky*.
 2. The husband continues liable even after the wife's death, in so far as he is *lucratus* or profited by her estate. Law does not consider a husband, who has got but a moderate tocher by his wife, as a gainer by the marriage, 23. Dec. 1665, *Burnet*: It is the excess only, which is *lucrum*, and which must be judged of, according to the quality of the parties, and their condition of life. As the husband was at no time the proper debtor in his wife's moveable debts; therefore, though he should be *lucratus*, he is, after the dissolution, only liable for them *subsidiarie*, i. e. if her own separte estate is not sufficient to pay them off, *P. Falc.* 54.

11. Where the wife is debtor in that sort of debt, which, if it had been due to her, would have excluded the *jus mariti*, e. g. in bonds bearing interest, the husband is liable only for the bygone interest, and those that may grow upon the debt during the marriage; because his obligation for her debts must be commensurated to the interest he has in her estate, 13. July 1708, *Gordon*. It is the husband alone who is liable in personal diligence for his wife's debts, while the marriage subsists: The wife, who is the proper debtor, is free from all personal execution upon them, while she is *vestita viro*, *F.* 11. Jan. 1704, *Gordon*.

12. The husband, by marriage, becomes The husband the perpetual curator of the wife. From this band is right it arises, 1. That no suit can proceed against the wife, till the husband be cited for his interest: And if she is married during the dependence of a process against her before an inferior
his wife's curator.
 Effects of this curatory,

ferior court, and if the husband dwells within another territory, he must be called by letters of supplement, which are granted of course by the Court of Session. 2. All deeds, done by a wife without the husband's consent, are null; neither can she sue in any action without the husband's concurrence. Where the husband refuses, or, by reason of forfeiture, &c. cannot concur; or where the action is to be brought against the husband himself for performing his part of the marriage-articles, the judge will authorise her to sue in her own name. To prevent the necessity of applying for the court's authority, care is generally taken, in marriage-contracts, to name certain trustees, at whose instance execution may pass against the husband. The effects arising from this curatorial power discover themselves even before marriage, upon the publication of banns; after which the bride, being no longer *sui juris*, can contract no debt, nor do any deed, either to the prejudice of her future husband, nor even to her own, *Dirl.* 13.: But it is not enough for this purpose that the banns have been published at the bridegroom's parish-church; the notification must be also made at the bride's, in order to interpel persons from contracting with her, 8. *July* 1623, *Macdougall*.

even before marriage.

Separate alimony.

13. If the husband should either withdraw from his wife, or turn her out of doors, or if, continuing in family with her, he should by severe treatment endanger her life, the commissaries will authorise a separation *a mensa et toro*, and give a separate alimony to the wife, suitable to her husband's estate, from the time of

of such separation, until either a reconciliation or a sentence of divorce.

14. Certain obligations of the wife are valid, notwithstanding her being *sub cura mariti*; What obligations of the wife valid. *ex. gr.* obligations arising from delict; for wives have no privilege to commit crimes. But, if the punishment resolves into a pecuniary mulct, Obligations ex delicto. the execution of it must, from her incapacity to fulfil, be suspended till the dissolution of the marriage, unless the wife has a separate estate exempted from the *jus mariti*, *Edg. 2. July 1724, Murray.—5. Dec. 1738, Gordon.*

15. Obligations arising from contract, affect either the person or the estate. The law has been so careful to protect wives, while *sub cura mariti*, that all personal obligations granted by a wife, though with the husband's consent, as bonds, bills, &c. are null; with the following exceptions, Personal obligations null. 1. Where the wife gets a separate *peculium* or stock, either from her father or a stranger, for her own or her children's alimony, she may grant personal obligations in relation to such stock, *Dirl. 164.*; and by stronger reason, personal obligations granted by a wife are good, when her person is actually withdrawn from the husband's power, by a judicial separation. Exceptions. 2. A wife's personal obligation, granted in the form of a deed *inter vivos*, is valid, if it is not to take effect till her death. *Feb. 1720, L. Tillibew.* 3. Where the wife is by the husband *praeposita negotiis*, Contracts of a wife who is praeposita, entrusted with the management, either of a particular branch of business, or of his whole affairs, all the contracts she enters into, in the exercise of her *praepositura*, are effectual, even though they be not reduced to writing, but should

bind the husband, not her. should arise merely *ex re*, from furnishings made to her : But such obligations have no force against the wife ; it is the husband only, by whose commission she acts, who is thereby obliged. A *praepositura* may be constituted, not only formally by writing, but tacitly, by the wife's being in use, for a tract of time together, to act for her husband, while he either approves of it by fulfilling her deeds, or at least, being in the knowledge thereof, connives at it, *Dirl.* 319.

The wife is *praeposita negotiis domesticis*. 16. A wife, while she remains in family with her husband, is considered as *praeposita negotiis domesticis* : And consequently, may provide things proper for the family, for the price whereof the husband is liable, though they should be misapplied, or though the husband should have given her money to provide them elsewhere, *Dirl.* 310. A husband, who suspects that his wife may hurt his fortune by high living, may use the remedy of inhibition against her ; by which all persons are interpellated from contracting with her, or giving her credit. After the completing of this diligence, whereby the *praepositura* falls, the wife cannot bind the husband, unless for such reasonable furnishings as he cannot instruct that he provided her with *aliunde*. As every man, and consequently every husband, has a right to remove his managers at pleasure, inhibition may pass at the suit of the husband against the wife, though he should not offer to justify that measure by an actual proof of the extravagance or profuseness of her temper, *Falc. vol.* 1. 209.*.

17. As

* *Kilk. husband and wife*, N^o. 12. and 13.

17. As to the rights granted by the wife affecting her estate; she has no moveable estate, except her *paraphernalia*; and those she may alien or impignorate, with consent of the husband as curator, otherwise not, 11. *July 1735, Gemmil.* She can even, without the husband, bequeath, by testament, her share of the goods in communion; but she cannot dispose of them *inter vivos*, for she herself has no proper right to them, while the marriage subsists; see 19. *Dec. 1626, Matthew.* A wife can lawfully oblige herself, in relation to her heritable estate, with consent of her husband; for though her person is in some sense sunk by the marriage, she continues capable of holding a real estate; and in such obligations, her estate is considered, and not her person, 15. *Dec. 1665, Ellis.—23. Jan. 1678, Bruce.* A husband, though he be curator to his wife, can, by his acceptance or intervention, authorise rights granted by her in his own favour; for a husband's curatory is not intended only for the wife's advantage, but is considered as a mutual benefit to both.

18. All donations, whether by the wife to the husband, or by the husband to the wife, are, both by the Roman law and ours, revocable by the donor; *ne conjuges mutuo amore se spolient, l. 1. de don. int. vir. et ux.*: but, if the donor dies without revocation, the right becomes absolute. A right may be revoked, not only by an explicit revocation, but tacitly, by afterwards conveying to another the subject of the donation, or by charging it with a burden in favour of a third party; but in so far as the subject is not burdened, the donation

Donations
between
husband
and wife
are revocable

K

subsists,

Rational
or remun-
eratory
grants are
not revo-
cable.

subsists, *Dirl.* 204. Though the deed should be granted nominally, or in trust, to a third party, it is subject to revocation, if its genuine effect be to convey a gratuitous right from one of the spouses to the other; *plus enim valet quod agitur, quam quod simulate concipitur*, 1. Feb. 1728, *Sanders*. Where the donation is not pure, it is not subject to revocation: Thus, a grant made by the husband, in consequence of the natural obligation that lies upon him to provide for his wife, is not revocable, unless in so far as it exceeds the measure of a rational settlement; See *Kilk.* husband and wife, No. 16. neither are remuneratory grants revocable, where mutual grants are made in consideration of each other, 26. Jan. 1669, *Chisholm*, except where an onerous cause is simulated, and a donation truly intended; or where what is given *hinc inde*, by the husband and wife, bears no proportion to each other. All voluntary contracts of separation, by which the wife is provided in a yearly alimony, were by our more ancient practice reprobated, as contrary to one of the essential duties of marriage, adherence, 11. Feb. 1634, *Drummond*; but by our later decisions, they are effectual as to the time past, but revocable either by the husband or wife, 6. Feb. 1666, *Livingston*.

Ratifica-
tion by
wives.

19. As wives are in the strongest degree subject to the influence of their husbands, third parties, in whose favour they had made grants, were frequently vexed with actions of reduction, as if the grant had been extorted from the wife, through the force or fear of the husband. To secure the grantees against this danger, ratifications were introduced, whereby the wife, appearing

appearing before a judge, declares upon oath, her husband not present, that she was not induced to grant the deed *ex vi aut metu*. Every deed, by which any interest accrues to a third party, may be secured by ratification, though a consequential benefit should arise from it to the husband, 1481, c. 84.; but pure donations, betwixt man and wife, do not appear to be the proper subjects of ratification; for law has made these revocable, as proceeding from the love, not the fear of the husband: And if a donation by a wife were rendered irrevocable by her ratification, which a husband might easily obtain by the same methods of persuasion which procured the gift, the law of donations, betwixt man and wife, would turn out a most unequal one to the wife. A wife's ratification is not absolutely necessary for securing the grantee: Law indeed allows the wife to bring reduction of any deed she has not ratified, upon the head of force or fear, of which if she brings sufficient evidence, the deed will be set aside; but if she fails in the proof, it will remain effectual to the receiver, 28. June 1706, Hay.

20. Marriage, like other contracts, might, by the Roman law, be dissolved by the contrary consent of parties; which unlimited power of divorce, after it had been for some time restrained, was again revived by the Christian Emperor Justinian, Nov. 140. c. 1.; but, by the law of Scotland, agreeable to the rules of our holy religion, marriage cannot be dissolved till death, except by divorce, proceeding either upon the head of adultery, *Matth. xix. 8. 9.*—*Mark x. 11.* or of wilfull desertion, 1. Cor. vii. 15.

The proper subject thereof.

Dissolution of marriage,

21. Mar-

by death
within
year and
day,

21. Marriage is dissolved by death, either within year and day of its being contracted, or after year and day. If it is dissolved within year and day, all rights granted in consideration of the marriage become void, and things return to the same condition in which they stood before the marriage: The tocher returns to the wife, or those from whom it came; and all the interest, either legal or conventional, arising to the wife in the husband's estate, returns to the husband or his heirs. In consequence of this rule, the right that the husband acquires by marriage to the wife's moveable estate, determines by the dissolution within year and day; with this restriction, that he is considered as a *bona fide* possessor, in relation to what he has consumed of these moveables, upon the faith of his right, while it subsisted; but he is liable to repay the tocher, without any deduction in consideration of his family-expence during the marriage, 23. *Feb. 1681, Gordon*. If things cannot be restored on both sides, equity hinders the restoring of one party, and not the other, 20. *July 1664, Petry*.

after year
and day.

Wife's
mourn-
ings, and
alimony
to the
term.

22. Upon the dissolution of a marriage, after year and day, the surviving husband becomes the irrevocable proprietor of the tocher; and the wife, where she survives, is entitled to her jointure, or to her legal provisions of terce, 2. 9. 26. and *jus relictae*, 3. 9. 5. She has also right to mournings, suitable to the husband's quality, and to alimony from the day of his death, till the term at which her life-rent-provision, either legal or conventional, commences. The measure of which alimony is regulated, not by the extent of her jointure, but by the

the husband's quality and fortune, and the condition of the family left by him, 15. *July 1713, Cred. of Scot.* If a living child be procreated of the marriage who has been heard to cry, the marriage has the same effect as if it had subsisted beyond the year. The crying of the child is, according to *St. 1. 4. 19.* the only evidence that ought to be received of its being born alive, that the matter may not be left to the uncertain conjectures of those who attend the birth of children; but the doctrine of the Roman law appears more equitable, which admits other circumstances, where they are equally strong, in proof of that fact, *l. 3. C. de post. her.* A day is adjoined to the year, *in majorem evidentiam*, that it may clearly appear that the year itself is elapsed; and, therefore, the running of any part of the day, after the year, has the same effect as if the whole were elapsed. The disputes that might arise from the dissolution of a marriage within the year, are generally prevented by a clause in marriage-contracts, that the interest of the husband and wife shall continue, though the marriage should be dissolved sooner, without a living child. The legal right of courtesy, competent to the surviving husband, is to be explained, 2. 9. 30.

23. Divorce is such a separation of married persons, during their lives, as looses them from the nuptial tie, and leaves them at freedom to intermarry with others. Marriage, being by the canonists numbered among the sacraments, is reckoned a bond so sacred that nothing can dissolve it. In the case of adultery itself, they allow only a separation from bed and board: And, even by our law, neither adultery nor wilfull

Dissolu-
tion after
a living
child.

Dissolu-
tion by
divorce
upon a-
dultery.

Cohabitation after adultery excludes divorce.

wilfull desertion, are grounds which must necessarily dissolve marriage; they are only handles, which the injured party may take hold of to be free. Cohabitation, therefore, by the injured party, after being in the knowledge of the acts of adultery, implies a passing from the injury; and no divorce can proceed, which is carried on by collusion betwixt the parties, left, contrary to the first institution of marriage, they might disengage themselves by their own consent, 15. *July 1681, Watson*. As by divorce, the nuptial tie itself is loosed, the guilty person, as well as the innocent, may contract second marriages; but, in the case of divorce upon adultery, marriage is, by special statute, prohibited betwixt the two adulterers, 1600, c. 20. a doctrine borrowed from l. 13. *de his quib. ut ind.*

Divorce upon wilfull desertion;

24. Where either party has deserted from the other for four years together, that other may, by 1573, c. 55. sue for adherence before the Commissary, whose decree the Session may enforce by letters of horning: If these have no effect, the church is to proceed, first by admonition, then by excommunication; all which previous steps are declared to be a sufficient ground for pursuing a divorce. *Depraxi*, the Commissaries pronounce sentence in the adherence, after one year's desertion; but four years must intervene between the first desertion and the decree of divorce. By the instructions, 1666, c. 2. the inferior commissaries can only judge in the previous action of adherence; the divorce must be carried before the Commissaries of Edinburgh.

25. The

25. The legal effects of divorce on the head its effects, of desertion are particularly defined by 1573, c. 55. by which the party offending forfeits the tocher and the *donationes propter nuptias*, (as to which see *Nov. 117. c. 8. § 2.*). By these, when applied to our law, must be understood the provisions that the wife is entitled to, either by law or by paction, in consideration of the tocher; and the meaning of the act is, that the offending husband shall restore the tocher, and forfeit to the wife all her provisions, legal and conventional; and, on the other hand, the offending wife shall forfeit to the husband her tocher, and all the rights that would have belonged to her, in the case of her survivance. This Lord *Stair*, 1. 4. 20. judges to be also the rule in divorces upon adultery; as it was by the Roman law, *d. Nov. 117.* But, by a decision 1762, *Justice*, founded on a tract of ancient decisions recovered from the records, the offending husband was allowed to retain the tocher.

TIT. 7. *Of Minors, and their Tutors and Curators.*

THE stages of life principally distinguished in law are, *pupillarity*, *puberty* or *minority*, and *majority*. A child is under pupillarity from the birth till fourteen years of age, if a male, and till twelve, if a female. *Pupillarity.* Minority begins where pupillarity ends, and continues till majority, which, by the law of Scotland, is the age of twenty-one years complete, both in males and females; but minority, in a large sense, *Minority.* *Majority.*

Tutary. fense, includes all under age, whether pupils or *puberes*. Because pupils cannot in any degree act for themselves, and minors seldom with discretion, pupils are put by law under the power of tutors, and minors may put themselves under the direction of curators. Tutory is a power and faculty to govern the person, and administer the estate of a pupil. Tutors are either nominate, of law, or dative; which answers to the *tutores testamentarii*, *legitimi*, and *dativi* of the Roman law.

Tutor nominate. 2. A tutor nominate is he who is named by a father, in his testament or other writing, to a lawful child. As the right of naming tutors proceeds from the fatherly power, those who are named by a mother or stranger, are not proper tutors; their powers are limited to the special estate left to the pupil; and, therefore, their being named cannot hinder the pupil from getting one who may defend his person, and manage his other estate. The nomination of tutors, being entirely pendent on the will of the father, may be altered at his pleasure, even though it should have been ingrossed in a writing in its nature irrevocable, as a disposition. A tutor nominate is not obliged to give caution for the faithful discharge of his office, because his fidelity is presumed to have been sufficiently known to the father*.

Tutor of law 3. If there be no nomination by the father, or if the tutors nominate do not accept, or if the nomination falls by death, or otherwise, there is place for a tutor of law, so called, because

* See this done, however, *Fount. 23. Feb. Crant. of Callander.*

cause he succeeds by the mere disposition of law. This sort of tutorship devolved by the ancient Roman law, and devolves also by ours, upon the next agnate; but the word *agnate* is differently understood in our law and in theirs.

Agnates, in the sense of the Roman law, were those whose propinquity was connected by males only; in the relation of cognates, one or more females were interposed. We understand by agnates, all who are related by the father, even though females intervene; and by cognates, those who are related by the mother.

4. Where there are two or more agnates equally near to the pupil, he who is entitled to the pupil's legal succession, falls to be preferred to the others, because it is presumed that he will be the most diligent in preserving the estate. But as the law suspects that he may not be over careful to preserve a life which stands in the way of his own interest, this sort of tutor is excluded from the custody of the pupil's person, which is commonly committed to the mother while a widow, until the pupil be seven years old; and, in default of the mother, to the next cognate. The tutor of law must be at least twenty-five years of age, 1474, c. 52. He is served or declared by a jury of sworn men, who are called upon a brief issuing from the chancery, which is directed to any judge having jurisdiction, 8. March 1636, Stuart. He must give security before he enters upon the management.

5. If no tutor of law demands the office, any person, even a stranger, may apply for a tutory-dative. But, because a tutor in law

L

ought

devolves
on the
next ag-
nate.

who?

Not in-
trusted
with the
person of
the pupil.

Form of
declaring
a tutor of
law.

ought to be allowed a competent time to deliberate whether he will serve or not, no tutory-dative can be given, till the elapsing of a year from the time at which the tutor of law had first a right to serve; *i. e.* till a year after the death of the deceased, if the father has named no tutors; and, if he has named tutors who have accepted, a year after the nomination falls by the death or incapacity of the nominees. It is the King alone, as the father of his country, who gives tutors-dative, by his Court of Exchequer; and no gift of tutory can pass in Exchequer, without the citation or consent of the next of kin to the pupil, both by the father and mother, 1672, *c.* 2.; nor till the tutor give security, recorded in the books of Exchequer.

named by
the King,

if there be
no tutor
nominate
or dative.

There is no room for a tutor of law, or tutory-dative, while a tutor nominate can be hoped for: And tutors of law, or dative, even after they have begun to act, may be excluded by the tutor-nominate, as soon as he offers to accept, unless he has expressly renounced the office, 6. July 1627, *Campbell*. If a pupil be without tutors of any kind, the Court of Session will, at the suit of any kinsman, name a factor (steward) for the management of the pupil's estate, who must conduct himself by the rules laid down *Act S.* 13. Feb. 1730.

Judicial
factor for
a minor.

Curators,

in what
cases im-
posed on
minors.

6. After the years of pupillarity are over, the minor is considered as capable of acting by himself, if he has confidence enough of his own capacity and prudence. The only two cases, in which curators are imposed upon minors, are, first, where they are named by the father in *liege poustie*, (or in a state of health), in consequence of 1696, *c.* 8. 2. Where the father

is

is himself alive; for a father is *ipso jure*, without any service, administrator, that is, both tutor and curator of law to his children, in relation to whatever estate may fall to them during their minority. This right in the father does not extend to grand-children, *Harc. 713.*; nor to such even of his immediate children as are forisfamiliaried, *arg. Dirl. 31.*: Neither has it place in subjects which are left by a stranger to the minor, exclusive of the father's administration. If the minor chooses to be under the direction of curators, he must raise and execute a summons, citing, at least, two of the next of kin, to appear before his own judge-ordinary, upon nine days warning, 1555, c. 35. At the day and place of appearance, he offers to the judge a list of those whom he intends for his curators: Such of them as resolve to undertake the office, must sign their acceptance, and give caution; upon which an act of curatory is extracted.

The father is tutor and curator to his children.

Form of choosing curators.

7. These curators are stiled *ad negotia*, to distinguish them from another sort called curators *ad lites*, who are authorized by the judge to concur with a pupil or minor in actions of law, either where he is without tutors and curators, or where his tutors or curators are parties to the suit. This sort is not obliged to give caution, because they have no intermeddling with the minor's estate: They are appointed for a special purpose; and, when that is over, their office is at an end, *Kilk. Tutor and Curator, No.*

Curators ad lites.

5. Women were, by the Roman law, debarred from the offices both of tutory and curatory, except in special cases: With us they are capable, under the following restrictions: 1. curatory

Who debarred from tutory and curatory

The

Women,
in what
cases ;

The office of a female tutor or curator falls by her marriage, even though the nomination should provide otherwise ; for, after she is herself subjected to the power of a husband, she is incapable of having any person under her power, *March 8. 1636, Stuart.*

Papists.

2. No woman can be tutor of law ; for that sort is marked out, purely on the score of blood, without any regard to personal qualities. Papists are declared incapable of tutory or curatory by 1700, c. 3.

What
number
must con-
cur.

Where the minor has more tutors and curators than one, who are called in the nomination to the joint management, they must all concur in every act of administration : Where a certain number is named for a quorum, that number must concur : Where any one is named, *sine quo non*, no act is valid without that one's special concurrence. But, if they are named without any of these limitations, the concurrence of the majority of the nominees then alive is sufficient.

Difference be-
tween tu-
tory and
curatory.

8. In this, tutory differs from curatory, that as pupils are incapable of consent, they have no person capable of acting, which defect the tutor supplies : But a minor *pubes* can act for himself. Hence the tutor subscribes alone all deeds of administration ; but in curatory, it is the minor who subscribes as the proper party ; the curator does no more than consent. Hence also, the persons of pupils are under the power, either of their tutors or of their nearest cognates ; but the minor, after pupillarity, has the disposal of his own person, and may reside where he pleases, *Dirl. 316.* In this sense, the rule of the Roman law may be understood, *tutor datur personae, curator rei.* In most other particulars,

the

the nature, the powers, and the duties of the two offices coincide. Both tutors and curators must, previous to their administration, make a judicial inventory, subscribed by them and the next of kin, before the minor's judge-ordinary, of his whole estate, personal and real; of which, one subscribed duplicate is to be kept by the tutors or curators themselves; another, by the next of kin on the father's side; and a third, by the next of kin on the mother's. If any estate belonging to the minor shall afterwards come to their knowledge, they must add it to the inventory within two months after their attaining possession thereof. Should they neglect this, the minor's debtors are not obliged to make payment to them; they may be removed from their offices as suspected, and they are entitled to no allowance for the sums disbursed by them in the minor's affairs, 1672, c. 2.; which last penalty does not reach to the expence laid out upon the minor's entertainment, or upon his lands and houses, *Act. S. 25. Feb. 1693*, nor even to sums expended in completing his titles, 18. July 1707, *Yeaman*.

9. Tutors and curators have power to sue for, and levy the minor's rents, interest, and even principal sums, if his necessities call for it; to grant acquittances to the debtors, and to name factors or stewards, with reasonable salaries. They may remove tenants, and grant leases of the minor's lands, to endure as long as their own office; but not under the former rental, without either a warrant from the Court of Session, or some apparent necessity: See *Dirl. 277*. But though they can use all diligence against the minor's debtors, the minor's creditors

Tutorial
and cura-
torial in-
ventories.

Penalties
of neglec-
ting to
make
them up.

Powers of
tutors and
curators;
in acts of
admini-
stration;

tors can use no execution against them, for payment of the debts due by the minor; for these are the minor's proper debts, and it cannot be known till accounting, whether the tutors or curators have, in their hands, any funds belonging to the debtor: Yet, they may be charged for the performance of facts in their own power, *e. g.* to make a subject forth coming, to renew investitures to the heirs of vassals, &c.

in selling
move-
ables;

in alien-
ing land
estates;

10. They have power to sell the minor's moveables, without which his personal estate would frequently be lost to him. They were, by the Roman law, denied the power of aliening land-estates, without the authority of a judge, *l. 1. § 2. de reb. eor. qui*; but that law obtains with us, only in the case of tutors; for the alienation of heritage by a minor, with consent of his curators, is valid, *sine decreto praetoris*, *St. 1. 6. 44.—F. 6. Dec. 1699, cred. of Clerk**. This restraint upon tutors does not reach to such alienations as law can compel the pupil to grant, *e. g.* to renunciations of wadsets, upon redemption by the reverser, 31. Jan. 1735, *Graham*; nor to the renewing of charters to heirs; but such charters must convey no right to the heir, which the former vassal had not.

in trans-
acting or
submitting
claims.

11. Tutors and curators may transact doubtful claims of moveable subjects, in which the minor's interest is concerned, or refer them to arbiters; which transactions, or decrees-arbitral, law will support, if the minor be not thereby enormously prejudiced, *F. 18. Jan. 1711,*

* See 17. Feb. 1731, *Campbell*.

1711, *Ayton*.—F. 14. Nov. 1711, *Aikenhead*. Tutors cannot alter the nature of the pupil's estate, so as to invert the former order of succession, *e. g.* by renewing his bonds with new clauses, secluding executors, *Harc.* 1000. But they may, if the pupil's security requires it, take an heritable bond in place of a personal; *Harc. suppl.* 14. It would seem, that a minor may, with consent of his curators, change a bond from moveable to heritable, since he can, by himself, dispose of a moveable bond by testament. Neither tutors nor curators can, contrary to the nature of their trust, (be *auctores* cannot be *in rem suam*) authorise the minor to do any deed for their own benefit; nor can they acquire any debt affecting the minor's estate: And, where a tutor or curator makes such acquisition, in his own name, for a less sum than the right is entitled to draw, the benefit thereof accrues to the minor, though the right should have been bought with the tutor's own money; or though the conveyance to him should purport, that the granter signed it from the favour he had to the tutor himself, 17. Feb. 1732, *Cochran*.

12. It is the duty of tutors and curators to take proper care of the minor's person and education, and to disburse the expence necessary for that purpose: Tutors ought not to employ a yearly sum exceeding the interest of the minor's stock, or the rent of his estate, for his education and maintenance; but curators may incroach on the stock itself, where it is small, or even employ the whole of it, if less will not do, for putting the minor in a way of business, *Br.* 110. It is also their duty to employ the

Their duty in regard to the minor's person;

in regard
to the ma-
nagement
of his mo-
ney.

the minor's rents and interests profitably. The sums which belonged to the minor before their entry into the office, if they carried no interest, ought to be put out at interest within a year thereafter: The rents of his land-estate which fall due during the office, are also to be lent upon interest within a year after they are payable, *F. 16. Jan. 1696, Irvine*. But the interest, arising on bonds, *pendente tutela*, need only be accumulated into a principal sum at the expiration of the office, *ibid*. If a right of succession should open to the minor during the office, the same rules must be observed in relation to the subject thereof, as if it had opened before the commencement of the office.

Their ob-
ligation
to dili-
gence af-
ter accep-
tance.

13. By the Roman law, tutory and curatory, being *munera publica*, might be forced upon every one who had not a relevant ground of excuse; but, with us, the persons named to these offices may either except or decline: And where a father, in *liege poustie*, names certain persons, both as tutors and curators to his children, though they have acted as tutors, they may decline the office of curatory, 1696, *c. 8*. Tutors and curators having once accepted, are liable *in diligence*, that is, are accountable for the consequences of their neglect in any part of their duty from the time of their acceptance, *Dirl. 233.*; insomuch, that though they have not had the least intromission with the minor's estate, they are accountable as if they had intermeddled. They are therefore liable to the minor for the debts due to him, if, so soon as a debtor is known to decline in his affairs, they neglect the proper diligence against his estate, 9. *July 1667, Steven*; and, if

if that will not do, personal diligence by a charge upon letters of horning; but they ought not to throw away the minor's money unprofitably against a debtor who has no fund of payment, 2. *July 1628, Hamilton.* Tutors and curators are accountable, *singuli in solidum, i. e.* every one of them is answerable, not only for his own diligence, but for that of his co-tutors; and any one may be sued without citing the rest: But he who is condemned in the whole has action of relief against his co-tutors.

They are liable, *singuli in solidum.*

14. This obligation to diligence reaches to *Pro-tu.* pro tutors and pro-curators, persons who act as tutors and curators without having a legal title *pro cura-* to the office. These have none of the active *tors.* powers or privileges competent to tutors or curators: They cannot pursue the minor's debtors for payment, nor will their acquittances exoner the debtors, unless the sum paid to them has been (*in rem versum*) profitably applied to the minor's use; but they are subjected *passive* to all the obligations that lie on tutors and curators, *Act. S. 10. June 1665.* From this obligation to diligence we may except, 1. *What tu-* Fathers or administrators in law, who, from the *tors are* presumption that they act to the best of their *exempt-* power for their children, are liable only for actual intromissions. 2. Tutors and curators who are named by the father in *lege pousie*, in consequence of 1696, c. 8. with the special provisos, that they shall be liable barely for intromissions, not for omissions; and that each of them shall be liable only for himself, and not *in solidum* for the co-tutors: But this power of exempting the nominees from diligence is,

What tutors are exempted from diligence.

by the act, limited to the estate descending from the father himself.

Actio tutelae, vel curatellae, directa.

15. The action, by which a minor may compel his tutors to account for their administration, is called *actio tutelae directa*. It does not lie till the office expires; because, as they have the complex management of the minor's whole affairs, a judgment cannot be formed on any one part till all be wound up: But pro-tutors and pro-curators may be sued by the minor at any time. Tutors and curators can compel the minor to repay what they have profitably expended for him during the administration, by the *actio tutelae contraria*. In this action, they must exhibit to the court the account, charge, and discharge, betwixt them and the minor; because, till accounting, they are presumed *in-tus habere*, to have effects of the minor in their own hands sufficient for answering their disbursements. They cannot, in this action, charge against the minor any salary or allowance for pains, unless a salary has been expressly contained in the testator's nomination; for their office is presumed gratuitous, 19 Feb. 1736. *Scot.*

Actio contraria.

How tut-
tory and
curatory
expire.

Tutors
may be
removed
as suspect.

16. Though no person is obliged to accept the office of tutor or curator, yet having once accepted, he cannot throw it up or renounce it without sufficient cause, 1555, c. 35. But, if he should be guilty of misapplying the minor's money, or fail in any other part of his duty, he may be removed by the *actio*, or rather *accusatio suspecti tutoris*, which was, by the Roman law, *popularis*, but with us can be pursued only by the minor's next of kin, or by a co-tutor or co-curator. By the last quoted act,

act, the judge ordinary was competent to this complaint; but, by our later custom, it must be tried by the Court of Session; and it may be brought before them summarily, in the special case of tutors named in consequence of the act 1696, c. 8. Where the misconduct proceeds merely from indolence, or inattention, the court, in place of removing the tutor, either join a curator with him, *Dirl.* 90.; or, if he be a tutor nominate, they oblige him to give caution for his past and future management, *F.* 16. *Feb.* 1705, *Balfours*.

What if
their mis-
conduct
be not
wilful.

17. The offices of tutory and curatory expire also by the pupil's attaining the age of puberty, or the minor's attaining the age of twenty-one years complete; and by the death, either of the minor, or of his tutor or curator. If two or more tutors or curators are called to the joint management, the gift or nomination has no force, till all of them accept, and it falls upon the death of any one of them, 17. *Jan.* 1671, *Drummond*. The non-acceptance, or supervening incapacity, or death of a *sine quo non*, has the same effect*: And this holds, not only in curatories, but in the nomination of tutors by a father; notwithstanding the presumption, that the father would have trusted any of the tutors named, rather than the tutor of law, *F.* 24. *June* 1703, *Aikenhead*. Where they are named in general terms, the nomination subsists, if any one accepts; and, upon the death of any one, the office accrues to the survivor.

In what
case tu-
tory falls
by the
death of
any one
of the
tutors.

18. Deeds either by pupils, or by minors having curators, without their consent, are null; but they oblige the granters, in as far as relates to

The effect
of deeds
by mi-
nors.

* The office of tutor or curator in a female, falls by her marriage, 8. *March* 1736, *Stewart*.

to sums profitably applied to their use. A minor under curators can indeed make a testament by himself, 30. *Nov* 1680, *Stevenson*; but whatever is executed in the form of a deed *inter vivos*, requires the curator's consent, *New Coll.* vol. 2. 66. Deeds by a minor who has no curators, are as effectual as if he had had curators, and signed them with their consent; he may even alien his heritage, without the interposition of a judge, 13. *Dec.* 1666, *Thomson*.

Restitu-
tion of
minors.

19. Minors may be restored against all deeds granted in their minority, that are hurtful to them. Deeds in themselves void, need not the remedy of restitution; but, where hurtful deeds are granted by a tutor in his pupil's affairs, or by a minor who has no curators, as these deeds subsist in law, restitution is necessary: And even where a minor having curators, executes a deed hurtful to himself with their consent, he has not only action against the curators, but he has the benefit of restitution against the deed itself, both by the Roman law, l. 2. 3. *C. si tut. vel cur interv.* and by ours, *Dirl.* 88. The minor cannot be restored, if he does not raise and execute a summons for reducing the deed, *ex capite minorennitatis et laesonis*, before he be twenty-five years old. These four years, between the age of twenty-one and twenty-five, called by us *quadriennium utile*, are indulged to the minor, that he may have a reasonable time, from that period, when he is first presumed to have the perfect use of his reason, to consider with himself, what deeds done in his minority have been truly prejudicial to him. This action must be pursued within the *quadriennium*, not only against third parties, but against the tutors

Within
what time
it must be
sought.

OR

or curators who have granted or consented to the deeds excepted to; though the action of tutory does not prescribe in less than ten years, K. 98.

20. Questions of restitution are proper to the Court of Session. Two things must be proved by the minor, in order to the reduction of the deed; 1. That he was minor when it was signed: Of this, an extract of the minor's baptism, from the kirk session books, is generally received as sufficient evidence, either by itself, 1722, *L. Logan*, or joined with the most slender collateral circumstances, *Dirl. 72.* 2. That the minor is hurt or lesed by the deed. This lesion must not proceed merely from accident; for the privilege of restitution was not intended to exempt minors from the common misfortunes of life; it must be owing to the imprudence or negligence of the minor, or his curator. For this reason, though a minor may be restored against the sentence of a judge, where the proper allegations or defences for him have been omitted, or hurtful ones offered in his name, 7. Dec. 1705, *Murray*; yet, if the minor's plea has been well conducted, there is no place for restitution, though the sentence should have been iniquitous, *F. 7. Jan. 1698, C. Kincardine.*

21. A minor cannot be restored against his own delict or fraud, *e. g.* if he should induce one to bargain with him, by telling him he was major. 2. Restitution is excluded, if the minor, at any time after majority, has approved of the deed, either by a formal ratification, or tacitly by payment of interest, or by other acts inferring approbation. 3. A minor, who

Its requisites.

1. The granter's minority.

2. His lesion, which must be owing to imprudence.

How excluded.

has

has taken himself to business, as a merchant, shopkeeper, &c. cannot be restored against any deed granted by him in the course of that business, *Dirl.* 360. ; especially if he was *proximus majorennitati* at signing the deed. 4. According to the more common opinion, a minor cannot be restored in a question against a minor, unless some gross unfairness shall be qualified in the bargain. *Lastly*, A minor could not, by our old law, have been restored, if he had sworn not to reduce the deed, agreeably to the constitution of *Frederick, Auth. l. 1. C. si. adv. vent.* : But, by 1681, c. 19. the elicitors of such oaths are declared infamous, and reduction is made competent to any of the minor's relations, lest himself should be backward to reduce, in his own name, a deed which he had sworn never to call in question.

How far
transmit-
ted to the
heir.

22. The privilege of restitution does not always die with the minor himself: If one should die in minority, or within the *quadriennium utile*, the right transmits to his heir, according to the following rules: 1. If a minor succeeds to a minor, the time allowed for restitution is governed by the minority of the heir, not of the ancestor. 2. If a minor succeeds to a major who was not full twenty-five, the privilege continues with the heir during his minority; but he cannot avail himself of the *anni utiles*, except in so far as they were unexpired to the ancestor at his death. 3. If a major succeeds to a minor, he has only the *quadriennium utile* after the minor's death; and, if he succeeds to a major dying within the *quadriennium*, no more of it can be profitable to him, than what remained when the ancestor died, *l. 18. § 5. l. 19. de minor.*

minor.—l. 5. *C. de temp. in int. restit.*—14.
March 1628, Macmath.

23. Restitution has the effect to make every thing return, *hinc inde*, to its former state. If matters are not entire, and so cannot be restored on both sides, the minor is not entitled to restitution, against such contracts as the other party has been, by the necessity of law, compelled to enter into with him, 1. *Dec. 1708, Towy*: But, in voluntary contracts, the minor will be restored, without being obliged to put the other party in his own place, unless he can do it without damage to himself; See *Dirl. 88.*

24. *Minor non tenetur placitare super hereditate.* *Minor non tenetur placitare.*
R. M. l. 3 c. 32. § 15.—Stat. Gul. c. 39. No minor can be compelled to state himself as a defender, in any action, whereby his heritable estate may be evicted from him, by one pretending a preferable right. Though the direct right contested should belong to a major, the minor may plead this privilege, if the eviction of his heritage should be the consequence of reducing the major's right, 23. *June 1625, Pringle.* The privilege indeed, as it is personal to the minor, cannot be pleaded in such case by the major, 25. *Nov. 1624, Hamilton*; but then, no sentence pronounced in the action against the major can affect the minor, who is not bound to appear in the suit. Our later lawyers, in explaining this rule, have restricted it to *hereditas paterna*; under which, *Visc. Stair, l. 6. 45.* comprehends all heritage, flowing from any ascendant in the right line, whether by the father or the mother. Heritage flowing from collaterals, as brothers, uncles, &c. has been, beyond all controversy,

Limitations of this rule.

fy, excluded from the rule, for some centuries past. By heritage is to be understood, a complete feudal right; so that the rule has no place in rights not perfected by seisin, where seisin is necessary to perfect them, 31. *Jan.* 1665. *Kello*; unless either the right has been completed by seisin, in the person of the father's author, 23. *June* 1625, *Pringle*; or the father or his author have done all they could to obtain seisin, *P. Falk.* 66. Leases, not being in their nature perpetual, fall not under this rule; but rights, though they be incorporeal, if they are feudal. *e. g.* rights of patronage, and even redeemable rights, are included in it, where the action brought against the minor is intended to impeach them, or set them aside upon any ground of nullity, *F.* 21. *Nov.* 1694, *Davidson*.

25. This privilege is intended merely to save minors from the necessity of disputing upon questions of preference; it does not therefore take place where the action is pursued on the father's falsehood or delict, 27. *Dec.* 1711, *Crawford*, nor upon his obligation to convey heritage, 25. *July* 1705, *Mackenzie*, nor on his liquid bond for a sum of money, *R. M. l.* 3. c. 32. § 16 though such action should have the effect to carry off the minor's estate by adjudication. Neither has it room in actions brought against the minor, for settling marches, nor in actions of molestation *in possessio*, *Dir.* 64. neither of which tend to evict the minor's heritage: Nor in actions pursued by the minor's superior, upon feudal casualties, or delinquencies; since these are burdens inherent in every feudal grant, and consequent upon the

dominium

dominium directum, which remains with the superior. This privilege cannot be pleaded in bar of an action which had been first brought against the father, and is only continued against the minor; nor where the father was not in the peaceable possession of the heritable subject at his death. Before the minor can plead it, he must be served heir to his father, *P. Falc.* 66.

26. The persons of pupils are protected from imprisonment on civil debts, by 1696, *c.* 41 *. ^{Pupils free from} The privileges of minors, in cases of prescription, redemption of adjudications, &c. will be explained in their proper places.

27. Curators are given, not only to minors, but, in general, to every one who, either thro' defect of judgment, or unfitness of disposition, is incapable of rightly managing his own affairs. ^{Curatory of idiots and furious persons.} Of the first sort are idiots and furious persons. Idiots, or *fatui*, are entirely deprived of the faculty of reason. The distemper of the furious person does not consist in the defect of reason, but in an overheated imagination, which obstructs the application of reason to the purposes of life. Curators may be also granted to lunatics, and even to persons dumb and deaf, tho' they are of sound judgment, where it appears that they cannot exert it in the management of business. Every person who is come of age, and is capable of acting rationally, has a natural right to conduct his own affairs. ^{How de-ferred.} The only regular way, therefore, of appointing this sort of curators, is by a jury summoned upon

N a

* But minors past pupillarity may be imprisoned for civil debts; *Kilk. Minor*, No. 6.

a brief from the Chancery ; which is not, like the brief of common tutory, directed to any judge ordinary, but to the judge of the special territory where the person alledged to be fatuous or furious resides ; that if he is truly of sound judgment, he may have an opportunity to oppose it : And, for this reason, he ought to be made a party to the brief. The care of furious persons belonged anciently to the Sovereign, because he alone had the power of coercing with fetters ; *Cr.* 393. § 9. ; whereas the care of idiots was committed to the next agnate. By 1585, *c.* 18. the Roman law, which commits the curatory of both to the agnate, is made ours : But a father is, by the custom of Scotland, preferred to the curatory of his fatuous son, and the husband to that of his fatuous wife, before the agnate.

Towhom.

His age.

28 Though, in the brief of idiotry, the inquest is directed to inquire, whether the next agnate be of lawful age, by which, in the general case, is meant the age of twenty-one ; yet in this question, the age of twenty five seems to be understood, both from 1474, *c.* 52. which requires that age in tutors of law, without distinction ; and from the reference made in 1585, *c.* 18. to the Roman law, by which none under the age of twenty-five can be curator to an idiot or furious person. By our old law, the inquiry of the inquest was confined to the present state of the fatuous or furious person ; and, consequently, no verdict of idiotry could be brought, as evidence, in the reduction of deeds granted by the idiot, prior to the date of the verdict ; but, by 1475, *c.* 67. a clause is ordained to be inserted in the brief, for inquiring

The verdict has a retrospect.

ring

ring how long the fatuous or furious person has been in that condition; and the verdict to be pronounced by the inquest is declared a sufficient ground, without farther evidence, for reducing all deeds granted after the period at which it appeared by the proof that the fatuity or fury began. But, as fatuous and furious persons are, by their very state, incapable of being obliged, all deeds done by them may be declared void, upon proper evidence of their fatuity at the time of signing, though they should never have been cognosed idiots by an inquest, 26. July 1638, *Loch.*

29. We have some few instances of the So Curatory
veraign's giving curators to idiots, where the dative of
next agnate did not claim; but such gifts are idiots.
truly deviations from our law, since they pass,
without an inquiry into the state of the per-
son upon whom the curatory is imposed. Hence
the curator of law to an idiot, serving *quando-*
cunque, is preferred as soon as he offers him-
self before the curator dative, 21. Jan. 1663,
Stewart. This sort of curatory does not de- How this
termine by the lucid intervals of the person curatory
sub cura; but it expires by his death or per. expires.
fect return to a sound judgment; which last
ought regularly to be declared by the sentence
of a judge.

30. Persons, let them be ever so profuse, or
liable to be imposed upon, if they have the ex-
ercise of reason, can effectually oblige them-
selves, till they are fettered by law. Interdic. Interdic-
tion is a legal restraint laid upon such persons, tion.
from signing any deed to their own prejudice,
without the consent of their curators or inter-
dictors.

Volun-
tary inter-
diction ;

how ta-
ken off.

Judicial
interdic-
tion ;

31. There could be no interdiction, either by the Roman law or our ancient practice, without a previous inquiry into the person's condition, *l. 6. de curat. fur.*—*Hope, (Interd.) 30. Jan. 1618, Robertson.* But as there were few who could bear the shame that attends judicial interdiction, however necessary the restraint might have been to preserve their families, voluntary interdiction has received the countenance of law ; which is generally executed in the form of a bond, whereby the granter obliges himself to do no deed which may affect his estate, without the consent of certain friends therein mentioned. 'Tho' the reasons inductive of the bond should be but gently touched in the recital, the interdiction stands good, *10. Nov. 1676, Stewart.* Voluntary interdiction, though it be imposed by the sole act of the person interdicted, cannot be recalled at his pleasure : But may be taken off, 1. By a sentence of the Court of Session, declaring, either that there was, from the beginning, no sufficient ground for the restraint, or that the party is, since the date of the bond, become *rei sue providus.* 2. It falls, even without the authority of the Lords, by the joint act of the person interdicted, and his interdictors, concurring to take it off. 3. Where the bond of interdiction requires a certain number as a quorum, the restraint ceases, if the interdictors shall be by death reduced to a lesser number, *8 Dec. 1708, Hepburn.*

32. Judicial interdiction is imposed by a sentence of the Court of Session. It commonly proceeds on an action brought by a near kinsman to the party ; and sometimes from the *nobile*

bile officium of the Court, when they perceive, during the pendency of a suit, that any of the litigants is, from the facility of his temper, subject to imposition, 17. Feb. 1681, *Robertson*.

This sort must be taken off by the authority of how taken the same court that imposed it; which autho-off. rity secures those who shall afterwards contract with him who had been interdicted, even tho' the strongest evidence should be brought that he still continues profuse, or easy to be imposed upon.

33. An interdiction need not be served against the person interdicted; but it must be executed or published by a messenger at the market cross of the jurisdiction where he resides, by publicly reading the interdiction there, after three oyeses made for convocating the lieges. A copy of this execution must be affixed to the cross; and thereafter, the interdiction, with its execution, must be registered in the books, both of the jurisdiction where the person interdicted resides, and where his lands lie, within forty days from the publication, 1581, c. 119. No. 1.—1597, c. 264. Where the sheriff refused registration, the presenter of the interdiction might apply to the clerk register, to have it recorded in the general register of the Session, 1597, c. 265.; but liberty is now given to record all interdictions there, even though the judge of the inferior jurisdiction should not refuse to register them, 1600, c. 13. An in- At what terdiction, before it is registered, has no effect period is against third parties, though they should be in interdic- the private knowledge of it; but it operates tion effec- tual. against the interdictors themselves as soon as it

it is delivered to them, 24. *July* 1678, *Grier-son*.

Interdic-
tion se-
cures the
heritage
from alie-
nation;

but not
the move-
able estate.

It does
not strike
against
rational
deeds.

34. An interdiction, duly registered, has this effect, that all deeds done thereafter by the person interdicted, without the consent of his interdictors, affecting his heritable estate, are subject to reduction. Registration, in the general register, secures all his lands from alienation wherever they lie; but, where the interdiction is recorded in the register of a particular shire, it covers no lands, except those situated in that shire. It appears both by the old style of interdictions, which continues to this day, and by our practice, that interdictions formerly secured the moveable estate from alienation, as well as the heritable, which made all commerce precarious; but, since the decision of 11. *July* 1634, *Bruce*, persons interdicted have had full power to dispose of their moveables, not only by testament, but by present deeds of alienation: And creditors, in personal bonds granted after interdiction, may use all execution against their debtor's person, and moveable estate; such bonds being only subject to reduction, in so far as diligence against the heritable estate may proceed upon them.

35. All onerous or rational deeds granted by the person interdicted, are as effectual, even without the consent of the interdictors, as if the granter had been laid under no restraint; but he cannot alter the succession of his heritable estate by any settlement, let it be ever so rational. No deed, granted with content of the interdictors, is reducible, tho' the strongest lesion or prejudice to the granter should appear. The only remedy competent, in such case, is an action

action by the granter against his interdictors, for making up to him what he has lost through their undue consent. It is no part of the duty of interdictors to receive sums, or manage any estate: they are given merely *ad auctoritatem præstendam*, to interpose their authority to reasonable deeds; and so are accountable for nothing but their fraud or fault in consenting to deeds hurtful to the person under their care. Office of interdictors.
 Reduction *ex capite interdictionis*, may be brought not only by the heirs of the interdicted person, and by the interdictors, but by the interdicted person himself; tho' he was not, by our ancient practice, allowed to pursue, in his own name, a reduction of his own deed, at least without the consent of his interdictors, *Maitland, 14. March 1554, Ure.* Reduc-
 tion to whom competent.

36. The law concerning the state of children falls next to be explained. 1 6. 1. Lawful children.
 Children are either born in wedlock, or out of it. All children, born in lawful marriage or wedlock, are presumed to be begotten by the person to whom the mother is married, and consequently to be lawful children. This presumption is so strongly founded, that it cannot be defeated, but by direct evidence that the mother's husband could not be the father of the child, *e. g.* where he is impotent, or was absent from the wife till within six lunar months of the birth. The canonists indeed maintain, that the concurring testimony of the husband and wife that the child was not procreated by the husband, is sufficient to elide this legal presumption for legitimacy; which doctrine is adopted by *Craig, 371. § 20.* and *Lord Stair, 3. 3. 42.* But it is an agreed point, that no regard is to be

be paid to such testimony, if it be made after they have owned the child to be theirs, *St.* 4. 45. 20. A father has the absolute right of disposing of his children's persons, of directing their education, and of moderate chastisement; and even after they become *puberes*, he may compel them to live in family with him, and to contribute their labour and industry, while they continue there, towards his service; which power of compulsion lasts, in Lord Stair's opinion, *1.* 5. 13. after their majority. Children, though in family with their father, are capable of receiving sums in gift or legacy, either from strangers, or from the father himself, which thereby become their property. A child who gets a separate stock from the father for carrying on any trade or employment, even though he should continue in the father's house, may be said to be emancipated or foris-familiated, in so far as concerns that stock; for the profits arising from it are his own. Foris-filiation, when taken in this sense, is also inferred by the child's marriage, or by his living in a separate house, with his father's permission, or good-will, *St.* 1. 5. 13. Children, after their full age of twenty-one years, become, according to the general opinion, their own masters; and, from that period, are bound to the father only by the natural ties of duty, affection, and gratitude. The mutual obligations between parents and children to maintain each other, are explained afterwards, 3. 1. 4.

Bastards.

37. Children born out of wedlock are stiled natural children or bastards. The state of these persons, while they are alive, must be tried

tried by the Commissaries; but all actions by the King or his donatory for fixing bastardy on persons deceased, must, like other declaratory actions, be brought before the Session. For the effects of bastardy, see afterwards, 3. 10. 3. 4. Bastards may be legitimated, or made lawful, either, 1. By the subsequent intermarriage of the mother of the child with the father. And this sort of legitimation, though it was not received by our ancient customs, *R. M. l. 2. c. 51. § 2.—Cr. 366. § 8.* does, by our present practice, entitle the child to all the rights of lawful children. The subsequent marriage which produces legitimation, is considered by the law to have been entered into when the child legitimated was begotten; and hence, if he be a male, he excludes, by his right of primogeniture, the sons procreated after the marriage, from the succession of the father's heritage, though these sons were lawful children from the birth. Hence also, those children only can be thus legitimated, who are begotten of a woman whom the father might at that period have lawfully married. 2. Bastards are legitimated by letters of legitimation from the Sovereign, 3. 10. 3.

38. As to the power of masters over their Servants.
servants: Though servants could not, by our old law, be sold by their masters, as their property, yet the condition of those called *nativi*, or bondmen, was in most respects as hard as that of the Roman *servi*, *R. M. l. 2. c. 11. et seq.—2. Att. c. 56.* But all servants have now, of a long time, enjoyed the same rights and privileges with other subjects, unless in so far as they are tied down by their engagements of
O service.

Necessary, service. Servants are either necessary or voluntary. Necessary are those whom law obliges to work without wages; of whom immediately. Voluntary servants engage without compulsion, either for mere subsistence, or also for wages. Those who earn their bread in this way, if they should stand off from engaging, may be compelled to it by the justices of the peace, who have power to fix the rate of their wages, 1661, *c.* 38.

Colliers
and salt-
ers.

39. Colliers, coal-bearers, and salters, and other persons necessary to collieries and salt-works, as they are particularly described, 1661, *c.* 5. were, like the *adscriptitii glebae* of the Roman law, tied down by our former law, to perpetual service, at the works to which they had once entered. Upon a sale of the works, the right of their service was transferred to the new proprietor. All persons were prohibited to receive them into their service, without a testimonial from their last master; and, if they deserted to another work, and were redemanded within a year thereafter, he who had received them was obliged to return them within twenty-four hours, under a penalty, 1606, *c.* 11. But by the Stat. 15. *Geo.* III. *c.* 28. all colliers, coal-bearers, and salters, are now emancipated from servitude; and it is declared, that none shall be bound to a colliery or salt-work, in any other way than as a common servant or labourer.

The poor.
Indigent
children.

40. The poor make the lowest class or order of persons. Indigent children may, by 1617, *c.* 10. be compelled to serve any of the King's subjects without wages till their age of thirty years.

years. Vagrants and sturdy beggars may be Sturdy
also compelled to serve any manufacturer, by *Sturdy*
1663, *c.* 16. And because few persons were *beggars.*
willing to receive them into their service, public
workhouses are, by 1672, *c.* 18. ordained to
be built for setting them to work. The poor
who cannot work must be maintained by the
parishes in which they were born, 1535, *c.* 22.;
and, where the place of their nativity is not
known, that burden falls upon the parishes
where they have had their most common resort
for the three years immediately preceding their
being apprehended, or their applying for the
public charity, 1663, *c.* 16.—1698, *c.* 21. See
New Coll. vol. 2. 19. Where the contributions *The poor*
collected at the churches to which they belong, *who can-*
are not sufficient for their maintenance, they are, *not work.*
by 1672, *c.* 18. to receive badges from the mi-
nister and kirk-session, in virtue of which they
may ask alms at the dwelling-houses of the in-
habitants of the parish.

BOOK II.

TIT. 1. *Of the Division of Rights, and the several ways by which a Right may be acquired.*

THE things or subjects to which persons have right, are the second object of law. The right of enjoying and disposing of a subject at one's pleasure, is called property. Where a subject belongs in common to two or more different persons, the right is called common property. Proprietors are restrained by law from using their property emulouſly to their neighbour's prejudice: But, wherever the lawful act of the proprietor tends to his own advantage, though it ſhould prove detrimental to his neighbour, law allows him to uſe what is his own at pleaſure. Every ſtate or ſovereign has a power over private property, called by ſome lawyers *dominium eminens*, in virtue of which, the proprietor may be compelled to ſell his property for an adequate price, where an evident utility on the part of the public demands it.

2. Certain things are by nature itſelf incapable of appropriation, as the air, the light, the ocean, &c.; none of which can be brought under the power of any one perſon, though their uſe be common to all: Others are by law

Things
that fall
not under
com-
merce.

law exempted from private commerce, in respect of the uses to which they are destined.

Of this last kind are, 1. The *res publicae* of ^{Res. pu-} the Romans, the property of which was in the ^{blicae.} state, and their use common to all the members

of it, as navigable rivers, highways, bridges, &c. By our feudal system, the right of these

is vested in the King chiefly for the benefit of his people; and they are called *regalia*, 2. 6. 5.

2. *Res universitatis*, things which belong in pro- ^{Res uni-} perty to a particular corporation or society, and ^{versitatis.} whose use is common to every individual in it;

but both property and use are subject to the regulations of the society; as town-houses, corporation halls, market-places, church-yards, &c.

The lands or other revenue belonging to a corporation do not fall under this class, but are *juris privati*.

3. Of the same nature with the *res univer-* Things ^{sitatis} are things appropriated for the service ^{sacred.} of God, as churches, church-bells, communion cups, &c.; which, by the Roman law,

were reckoned the property of none; but, by ours, may be disposed of or sold on proper occasions, and others substituted in their room:

Thus, churches may be removed from place to place, 1. 5. 11.; and church-bells or communion-cups, when they become unfit for use,

may be sold, either by the heritors, or by the kirk-session, with their consent.

The right ^{Right in} which is sometimes acquired by private per- ^{the seats} sons in the seats of a church, is not, in strict ^{of a} speech, a right of property, but is confined to ^{church.} the special purpose of attending divine service;

and may be taken from the acquirer, if he re-

moves

moves to another parish, and if the increase of the parishioners, to all of whom the common use of the church belongs, makes a division of the *area* necessary.

Ways of
acquiring
property.

Occupation;

it takes
no place
in in moveable
subjects;
nor in moveables
which
have had
an owner:

4. Property may be acquired either by occupation or accession, and transferred by tradition or prescription: But prescription, being also a way of losing property, falls to be explained under a separate title. Occupation, or occupancy, is the appropriating of things which have no owner, by apprehending them, or seizing their possession. This was the original method of acquiring; for, in the first state of mankind, before societies were formed, every person, barely by taking into his possession a certain portion of ground, and cultivating it, made the fruits thereof his own; and, when he thought fit to abandon it, the next occupier acquired the same right. This continued, under certain restrictions, the doctrine of the Roman law, *Quod nullius est, fit occupantis*; but it can have no room in the feudal plan, by which the King is looked on as the original proprietor of all the lands within his dominions.

5. Even in that sort of moveable goods which are presumed to have once had an owner, a different rule obtains by the law of Scotland, viz. *Quod nullius est, fit domini regis*. Thus, the right of treasures hid underground is not acquired by occupation, but accrues to the King. *2. Att. c. 48. § 4. 5.*: Thus also, where one finds strayed cattle, or other moveables, which have been lost by the former owner, (waif goods), the finder acquires no right in them, but must give public notice thereof;

thereof; and if within year and day after such notice the proprietor does not claim his goods, they become escheat, *ib.* § 14.; and so fall to the King, Sheriff, or other person, to whom the King has made a grant of such escheats.

6. In that sort of things which never had an owner, whether animals, as wild beasts, fowls, fishes, or inanimate things, as pearls found on the shore, the original law takes place, that he who first apprehends becomes proprietor; insomuch, that, though the right of hunting, fowling, and fishing, be restrained by statute, under certain penalties, 1685, *c.* 20.—1707, *c.* 13 —24 *Geo.* II. *c.* 34.; yet all game, even what is caught in contravention of these acts, becomes the property of the catcher, unless where the confiscation thereof is made part of the penalty: But whales thrown in or killed on our coasts belong neither to those who kill them, nor to the proprietor of the grounds on which they are cast, but to the King; and are therefore called royal fishes. By the *leges for- restarum*, § 17. according to a copy in the Advocates Library, all great whales fall as escheat to the King; and also such smaller whales as cannot be drawn by a wane with six oxen. But it obtains in moveables which never had an owner.

7. Accession is that way of acquiring property, by which, in two things which have a connection with, or dependence on, one another, the property of the principal thing draws after it the property of its accessory. Thus, the owner of a mare or cow becomes the owner of the foal or calf; a house belongs to the owner of the ground on which it stands, though Accession.

though built with materials belonging to, and at the charge of another; trees taking root in our ground, though planted by another, become ours. Thus also, the insensible addition made to one's ground by what a river washes from other grounds, which is called

Alluvio.

Paintings
fall not
under ac-
cession;

nor writ-
ings.

Specifica-
tion.

alluvio, accrues to the master of the ground which receives the addition, § 19. 20. *Inst. de rer. div.* The Romans excepted from this rule the case of paintings drawn on another man's board or canvas in consideration of the excellency of the art, *ib.* § 34.; which exception our practice has, for a like reason, extended to what is written on another man's paper or parchment.

8. Under accession is comprehended specification, by which is meant a person's making a new species or subject, from materials belonging to another. Where the new species can be again reduced to the matter of which it was made, law considers the former mass as still existing; and therefore the new species, as an accessory to the former subject, belongs to the proprietor of that subject: But, where the thing made cannot be so reduced, as in the case of wine, which cannot be again turned into grapes, there is no place for the *fiction juris*; and therefore the workmanship draws after it the property of the materials, § 25. *Inst. de rer. div.*

Commix-
tion,

9. Though the new species should be produced from the commixtion or confusion of different substances belonging to different proprietors, the same rule holds, *l.* 5. § 1. *de rei vind.*; but, where the mixture is made by

by the common consent of the owners, such ^{made by} consent makes the whole a common property, ^{consent of} according to the shares that each proprietor ^{the pro-} had formerly in the several subjects. Where ^{prietors;} things of the same sort are mixed without the consent of the proprietors, which cannot a- ^{made} gain be separated, *e. g.* two hogsheds of wine, ^{without} the whole likewise becomes a common proper- ^{their con-} ty; but, in the after division, regard ought to ^{sent.} be had to the different quality of the wines. If the things so mixed admit of a separation, *e. g.* two flocks of sheep, the property continues distinct. This last rule was, with too great subtlety, extended by the Roman law to the casual commixtion of all solids, even where a separation was really impracticable, *e. g.* to the mixture of two parcels of wheat; because each grain or particle retained its own form, notwithstanding the commixtion, § 28. *Inst. de rer. div.*

10. Property is carried from one to another Tradition, by tradition, which is the delivery of possession by the proprietor, with an intention to transfer the property to the receiver. Two things are therefore requisite, in order to the transmitting of property in this way: 1. The intention or consent of the former owner to transfer it on some proper title of alienation, as sale, exchange, gift, &c. 2. The actual delivery, in pursuance of that intention. The first is called the *causa*, the other the *modus transferendi dominii*: Which last is so necessary to the acquiring of property, that he who gets the last right, with the first tradition, is preferred, according to the rule, *l. 20. C. de*

P past.

paſſi Traditionibus, non nudis paſſis, transferuntur rerum dominia.

either real
or symbolical.

11. Tradition is either real, where the *ipſa corpora* of moveables are put into the hands of the receiver; or symbolical, which is uſed where the thing is incapable of real delivery, e. g. in immoveable ſubjects, as lands, mills, houſes; or in ſubjects which conſiſt *in jure*, (things incorporeal), as rights of juriſdiction, patronage, fiſhing &c.; in all which, certain ſymbols are delivered to the receiver, to ſtand in place of the delivery of the poſſeſſion. The property of certain moveables, though they are capable of real delivery, may be transferred by ſymbolical. Thus, if the ſubject be under lock and key, the delivery of the key is conſidered as a legal tradition of all that is contained in the repository. In one particular caſe, property is transferred without any tradition, either real or ſymbolical viz. where the poſſeſſion or cuſtody of the ſubject has been before with him to whom the property is to be tranſferred; for which this plain reaſon may be given, without the neceſſity of recurring to a fiction of law, that in ſuch caſe there is no room for tradition.

Poſſeſſion,

how acquired;
how continued.

12. Poſſeſſion, which is eſſential both to the acquisition and enjoyment of property, is defined, the detention of a thing, with a deſign or *animus* in the detainer of holding it as his own. It cannot be acquired by the ſole act of the mind, without real detention; but, being once acquired, it may be continued *ſolo animo*. Poſſeſſion is either natural or civil. Natural poſſeſſion is, when one poſſeſſes by himſelf:

self: Thus, we possess lands by cultivating them and reaping their fruits, houses by inhabiting them, moveables by detaining them in our hands. Civil possession is our holding the thing, either by the sole act of the mind, or by the hands of another who holds it in our name: Thus, the owner of a thing lent possesses it by the borrower; the proprietor of lands by his tacksman, trustee, or steward; the pupil, by his tutor, &c. The same subject cannot be possessed entirely, or *in solidum*, by two different persons, at one and the same time; and therefore possession, by an act of the mind, ceases, as soon as the natural possession is so taken up by another, that the former possessor is not suffered to re enter. Yet two persons may, in the judgment of law, possess the same subject, at the same time, on different rights. Thus, in the case of a pledge, the creditor possesses it in his own name, in virtue of the right of impignoration, while the proprietor is considered as possessing, in and through the creditor, in so far as is necessary for supporting his right of property. The same doctrine holds in literenters, tacksmen, and, generally, in every case where there are rights affecting a subject distinct from the property.

13. A *bona fide* possessor is he who, though he is not really proprietor of the subject, yet believes himself proprietor on probable grounds. A *mala fide* possessor knows, or is presumed to know, that what he possessed is the property of another. A possessor *bona fide* acquired secures right, by the Roman law, to the fruits of the subject possessed, that had been reaped and consumed

as far as
he has ei-
ther con-
sumed or
uplifted.

consumed by himself, while he believed the sub-
jects his own, § 35. *Inst. de rer. div.* By our
customs, perception alone, without consump-
tion, secures the possessor: Nay, if he has sown
the ground while his *bona fides* continued, he
is entitled to reap the crop, *propter curam et
culturam*. But this doctrine does not, accor-
ding to *Bankt.* 1. 214. 19. reach to civil fruits,
e. g. the interest of money, which the *bona fide*
receiver must restore, together with the princi-
pal, to the owner.

When *bo-
na fides*
ceaseth.

14. *Bona fides* necessarily ceaseth by the *con-
scientia rei alienæ* in the possessor, whether such
consciousness should proceed from legal inter-
pellation, or private knowledge; for the es-
sence of *bona fides* consists in the possessor's opi-
nion that the subject is his own, *l.* 20. § 11.
de her. pet.—20. Nov. 1662, Children of *Wool-
met.* The decision, 14. March 1626, brought
by Viscount Stair in support of the contrary
opinion, proves no more, than that an assigna-
tion without intimation is an incomplete deed.
Mala fides is sometimes induced by the true
owner's bringing his action against the posses-
sor, by which the lameness of his title may ap-
pear to him; sometimes not till litiscontestation,
which was the general rule of the Roman law;
and, in cases uncommonly favourable, it is not
induced till sentence be pronounced against the
possessor.

Effects of
possession
of move-
ables;
of im-
movea-
bles.

15. The property of moveable subjects is
prelumed by the bare effect of possession, until
the contrary be proved; but possession of an
immoveable subject, though for a century of
years together, if there is no seisin, does not
create

create even a presumptive right to it: *Nulla fassa, nulla terra*. Such subject is considered as caducuary, and so accrues to the Sovereign.

Where the property of a subject is contested, the lawful possessor is entitled to continue his possession till the point of right be discussed; and, if he has lost it by force or stealth, the judge will, upon summary application, immediately restore it to him. Privileges of possession.

16. Where a possessor has several rights in his person affecting the subject possessed, the general rule is, that he may ascribe his possession to which of them he pleases: But, 1. One cannot ascribe his possession to a title other than that on which it commenced, in prejudice of him from whom his title flowed, *St. 2. 1. 27.*—2. If, in a competition, a possessor shall be forced to depart from a title as lame, by which he had defended himself, he cannot thereafter ascribe his intromission, in prejudice of his competitor, either to that title from which he was beat, or to any other equally insufficient. 3. He who has a sovereign right in his person to a subject, will not be allowed to ascribe his possession to any other right which he may have acquired as accessory to the first, 7. *July 1708, Lord Al. Hay.* To what title possession ought to be ascribed.

TIT. 2. *Of Heritable and Moveable Rights.*

FOR the better understanding the doctrine of this title, it must be known, that though, by the Roman law, the person or persons next of blood to one dying intestate, succeeded to the right of his whole estate, of whatsoever subjects it might have consisted: Yet, by the law of Scotland, and indeed of most nations of Europe, since the introduction of feus, wherever there are two or more in the same degree of consanguinity to the deceased, who are not all females, such rights as are either properly feudal, or have any resemblance to feudal rights, descend by law wholly to one of them, who is considered as the proper heir of the deceased; the others, who have the name of next of kin or executors, must be contented with that portion of the estate which is of a more perishable nature. Hence has arisen the division of rights to be explained under this title; the subjects descending to the heir, are styled heritable, and those that fall to the next of kin, moveable.

Rights
are either
heritable
or move-
able.

2. All rights of, or affecting lands, under which are comprehended houses, mills, fishings, teinds; and all rights of subjects that are *fundo annexa*, whether completed by seisin or not, are heritable *ex sua natura*. On the other

ther part, every thing that moves itself, or can be moved, and in general, whatever is not united to land, is moveable: as household furniture. corns. cattle. c^h arrears of rent and of interest: even tho' they should be due on a right of annual rent: For tho' the arrears last mentioned are secured on land, yet being presently payable, they are considered as cash. It has been doubted, whether bygone feu-duties fall under this rule; and on the supposition that they did not, as being inseparable from the right of superiority itself, it was adjudged, K. 14. that the vassal's heir was the proper debtor in the feu-duties due by the vassal before his death: But it was since decided, *Tinw. 25.* Bygone *June 1755, Martin against Agnew of Sheuchan,* feu-duties are moveable. that bygone feu duties, like other arrears, are moveable, and consequently belong to the superior's executors. In rights bearing a tract of future time, *i. e.* rights which cannot be fulfilled at once, and which carry a yearly profit to the creditor while they subsist, *e. g.* an annuity for a certain term of years; tho' the arrears due before the creditor's death are moveable, yet the rights themselves are heritable; both because they yield an annual profit, and because nothing falls under executry, but what is instantly payable, and can be gathered in, and distributed among those that have interest in it, *New Coll. 39.*; So that, admitting them not to be heritable *ex sua natura*, the heir is the only person who can take them. Leases of land are heritable both as they have a tract of future time, and as statute has given to them, in certain respects, the effect of real rights of land, 2. 6. 9.

3. Debts, (*nomina debitorum*), when due by bill, promissory note, or account, are moveable. When constituted by bond, they do not all fall under any one head; but are divided into heritable and moveable, by the following rules. The taking of interest being forbidden by the canon law, persons who could make no profit of their money, but by putting it out at interest, were, before the reformation, laid under the necessity of purchasing rights on land constituted by infeftment; by which, the lands contained in the right were burdened with the yearly payment of a certain sum to the receiver, redeemable by the proprietor, on repayment of the purchase money. As these were bargains affecting land, they were understood to be heritable. Even after the reformation, till towards the end of the last century, the form of these rights suffered but little variation: During that period, the debtor, in consideration of a certain sum lent, became bound to infeft the creditor, in a correspondent annualrent forth of his lands, and obliged himself personally to the payment thereof; but he came under no obligation for the principal sum, except in the special case, that the creditor should choose to make requisition of his money, rather than retain the heritable right.

Rights of annual-rent, But now these rights are changed into proper and bonds bearing infeftment, bonds, by the first part of which the debtor is personally bound to repay the principal sum and interest; and, for the creditor's farther security, obliges himself to infeft him in the annualrent. All debts constituted by either of these forms are heritable, for they not only carry

and heritable,

carry a yearly profit, but are secured upon land.

4. Bonds merely personal, though bearing a clause of interest, have been always moveable before the term of payment, because it is presumed, that the creditor is at that term to turn his bond into cash, 26. *Feb. 1629, Douglas*: But such bonds, after the term of payment, were, by our old law, considered as *foeda pecuniae*, and consequently heritable; for which this reason is generally given, that, by the creditor's not calling then for his money, his intention was presumed to let it lie for some time at a yearly profit: And where the first term of payment of the interest was made prior to the term of payment of the principal sum, the bond became heritable from the period that the interest first fell due, because the creditor was thereby presently entitled to yearly profits on his bond, *Harc. 348*. Debts which carried interest, not from the force of any clause in the obligation, but *ex lege*, as bills, claims of relief, &c. were moveable; because in these, it was not the creditor who created the interest, but the law itself, which considered not so much the raising a yearly profit on the subject, as the equity of the case, 10. *July 1628, Cant.*

5. For enlarging the fund for the provision of younger children, all sums contained in contracts and obligations having clauses of interest, are declared to belong, in time coming, not to the heir, but to the next of kin or executors, by 1661, c. 32. copied after 1641, c. 57.; and so are made moveable in regard to succession. But the statute provides, that they shall

Personal bonds were formerly heritable, after the term of payment:

They are now moveable as to succession;

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Personal bonds were formerly heritable, after the term of payment:

They are now moveable as to succession;

Q

still

but continue heritable as to the fife and relict, still continue heritable with respect to the fife, and to the rights of husband and wife; that is, though, by the general rule, moveable rights fall under the communion of goods consequent upon marriage, 1. 6. 7. and the moveables of denounced persons fall to the crown or fife, by single escheat, 2. 5. 27. yet bonds bearing interest do neither, but are heritable in both respects.

What bonds are still heritable.

Bonds excluding executors.

Bond taken to heirs.

6. By this statute, bonds bearing an obligation to intestate, and bonds taken payable to heirs and assignees, including executors, continue heritable in all respects; the first, from the proper nature of the right, and the other, from the destination of the creditor. A bond including executors, when it is carried from the original creditor to his heir by a service, continues heritable, K. 53. Where the creditor assigns such bond to his eldest son, and his heir, tho' without any express exclusion of executors, it also continues heritable in the person of the eldest son, *Falc. vol. 1. 215.*; but, if it were so assigned to a stranger and his heirs, it would probably go to the assignee's executors; since the exception in the statute arises not from the heritable nature of the debt, (bonds including executors being, in their nature, as really moveable as others), but from the destination of the creditor, which cannot be interpreted to regulate the succession of an assignee, over whom the creditor has no power.

7. The right of a bond which is made payable to heirs, without mention of executors, descends not to the proper heir in heritage, though heirs are mentioned in the bond, but to the executors; for the word *heir*, which is a generic

generic term, points out him who is to succeed by law in the right; and the executor, being the heir *in mobilibus*, is considered as the person to whom such bond is taken payable. But, where a bond is taken to heirs-male, or to a series of heirs, one after another, such bond is heritable, because its destination necessarily excludes executors. This statute has made no alteration in the condition of rights that were formerly moveable; and therefore, such bonds or other debts as were moveable by the old law, continue moveable to this day, in all respects, even *quoad fiscum et relictam*, Edg. 18. Dec. 1724, *Lefly—Falc.* vol. 2. 14.

8. Subjects originally moveable become heritable: 1. By the proprietor's destination. Thus, a jewel, or any other moveable subject, may be provided to the heir. And the destination, if it be properly expressed, has this effect, tho' it should not be carried into execution. Hence, a sum destined by a marriage-contract to be settled on heirs, is heritable, tho' no settlement should be made in pursuance of the destination, 19. Jan. 1637, *Robertson*. This arises from the right competent to every proprietor to settle his property on whom he pleases. 2. Moveable rights may become heritable by the supervening of an heritable security: Thus, a sum due by a personal bond becomes heritable, by the creditor's accepting an heritable right for securing it, or by adjudging upon it. In these instances, destination is not considered; for creditors, when they take heritable rights, or deduce adjudications on their debts, are presumed to do it to secure their payment, and not to alter the order of succession: And,

Bond taken to heirs-male.

Moveable rights become heritable, either destination,

or sua natura.

by trust-
rights of
heritable
subjects.

Heritable
rights do
not be-
come
moveable,

either by
obtaining
decree,

And, for that reason, in the case of an adjudication, the debt does not change its nature from the date of the summons of adjudication, by which the creditor shews his intention to adjudge; but, from the date of the decree, by which the debt is made a real burden on the lands, *F. 16. Jan. 1700, Carnegy*. Trust rights of heritable subjects, granted by a debtor to his personal creditors, and accepted or acceded to by them, make their debts heritable; but, as soon as the subject of the trust is sold, the debts return to their former moveable nature.

9. Heritable rights do not become moveable by accessory moveable securities, *P. Falc. 43.*; the heritable right being, in such case, the *jus nobilius* which draws the other after it. By our former law, requisition by a creditor, in a right of annualrent, made the sum in the right moveable, which before was heritable. This seems to have proceeded, not so much from the indication thereby given of the creditor's purpose to have his money, as from the old style of heritable bonds bearing requisition, by which the creditor's requisition, and the subsistence of the real right of annualrent, were made incompatible, *supr. § 3.*; so that, the real right being dissolved, the sum could remain no longer heritable. In other cases, therefore, where no such speciality occurs, the creditor, though he should discover an intention to have his money, does not thereby alter the nature of the debt: Thus, though the obtaining of a decree implies in it a demand of the debt by the creditor, it does not make an heritable sum moveable, *F. 27. Feb. 1712. Scot*; thus also, tho' a charge given upon letters of horning by

a creditor, is the strongest indication of his purpose to recover payment; yet, by our latest decisions, neither a charge on a bond made heritable by adjudication, 12. Nov. 1728, *Reids*, nor on a bond including executors, 24. July 1705, *Gray*, has the effect to make the sum moveable; see *Falc.* vol. 2. 234. In the same manner, a bond not falling under the *jus mariti* continues, in the opinion of *Mackenzie, b. t.* § 7. heritable, so as to exclude the husband, notwithstanding a charge given on it by the wife.

10. Where lands are voluntarily sold, either by a formal disposition, or even by a minute of sale, the price, if it be not heritably secured, must, as a moveable subject, go to the seller's executors, *F. 22. Dec. 1704, Ebiefly*. But, in judicial sales for the behoof of creditors, the debts continue heritably secured on the price, till payment or the conveyance to the purchaser; and therefore, in so far as they are not paid to the creditor himself, they must go to his heir.

11. Certain subjects partake, in different respects, of the nature both of heritable and moveable. Personal bonds are now moveable in respect of succession, but heritable as to the fisk, and husband and wife. All bonds, whether merely personal, or even heritable, on which no seisin has followed, may be affected at the suit of creditors, either by adjudication, which is a diligence proper to heritage; or by arrestment, which is peculiar to moveables, 1661, c. 51. Bonds including executors, tho' they descend to the creditor's heir, are payable by the debtor's executors without relief against the heir; since the debtor's succession cannot be affected by the

or even
by char-
ging for
the debt.

Price of
lands,
when he-
ritable,
when
moveable.

Rights
partly he-
ritable,
partly
moveable.

Heritable
bonds be-
fore seisin.

Bonds se-
cluding
executors.

Bonds
with a
substitu-
tion.

the destination of the creditor : And, on the same ground, an obligation to employ a sum due by a moveable bond, in favour of the heir of a marriage, is heritable as to the creditor, because of the destination; but it continues moveable as to the debtor, 25. *July 1662, Nasmith.* A bond taken to a creditor, and, failing him, to a substitute, is, in the opinion of some lawyers, *St. Ans. voce Substitutes*, in so far moveable, that the creditor can bequeath it by testament; and yet it descends not to executors; and the method of completing titles to it by the substitute, after the creditor's death, is by service as heir of provision, which is a method of transmission proper to heritage: But it is a rule more agreeable to the analogy of our law, that nothing which goes to the heir by service, can be carried off to his prejudice, either by a deed on deathbed, or by testament.

What pe-
riod makes
a subject
heritable
or move-
able.

12. All questions, whether a right be heritable or moveable, must be determined according to the condition of the subject at the time of the ancestor's death. If it was heritable at that period, it must belong to the heir; if moveable, it must fall to the executor, without regard to any alterations that may have affected the subject, in the intermediate period between the ancestor's death and the competition.

TIT.

TIT. 3. *Of the Constitution of Heritable Rights
by Charter and Seisin.*

HERITABLE rights are governed by the Origin of feudal law, which owed its origin, or at least its first improvements, to the Longobards; whose Kings, upon having penetrated into Italy, the better to preserve their conquests, found it their interest to make grants to their principal commanders of great part of the conquered provinces, to be again subdivided by them among the lower officers, under the conditions of fidelity and military service.

2. The feudal constitutions and usages were first reduced into writing, about the year 1150, by two lawyers of Milan, under the title of *Consuetudines Feudorum*, and have been subjoined to Justinian's Novels, in almost all the editions of the body of the Roman law. None of the German Emperors appear to have expressly confirmed this collection by their authority; but it is generally agreed that it had their tacit approbation, and was considered as the customary feudal law of all the countries subject to the empire. No other country has ever acknowledged these books for their law; but each state has formed to itself such a system of feudal rules as best agreed with the genius of its own constitution. In feudal questions, therefore, we are governed, in the first place, by

By what law feudal questions are to be decided.

Definition of feus.

Feus are now patrimonial.

Superior and vassal

by our own statutes and customs ; where these fail us, we have regard to the practice of neighbouring countries, if the genius of their law appears to be the same with ours ; and, should the question still remain doubtful, we may have recourse to those written books of the feus, as to the original plan on which all feudal systems have proceeded

3. This military grant got the name, first of *beneficium* and afterwards of *feudum* ; and was defined a gratuitous right to the property of lands made under the conditions of fealty and military service to be performed to the grantor by the receiver ; the radical right of the lands still remaining in the grantor. Under lands, in this definition, are comprehended all rights or subjects so connected with land, that they are deemed a part thereof ; as houses, mills, fishings, jurisdictions, patronages, &c. Though feus in their original nature were gratuitous, they soon became the subject of commerce, *lib. 1. feud. t. 16* ; services of a civil or religious kind were frequently substituted in place of military, *lib. 2. t. 2. § 2.* ; and now, of a long time, services of every kind have been entirely dispensed with, in certain feudal tenures. He who makes the grant is called the superior, and he who receives it the vassal. The subject of the grant is commonly called the feu ; tho' that word is at other times, in our law, used to signify one particular tenure, *2. 4. 2.* The interest retained by the superior in the feu is styled *dominium directum*, or the superiority ; and the interest acquired by the vassal, *dominium utile*, or the property. The word *fee* is promiscuously applied to both.

4. Allodial

4. Allodial goods are opposed to feus; by which are understood, goods enjoyed by the owner, independent of a superior. All moveable goods are allodial; lands only are so, when they are given, without the condition of fealty or homage. In this sense, all subjects, immovable as well as moveable, were allodial by the Roman law; but, by the feudal system, the sovereign, who is the fountain of feudal rights, reserves to himself the superiority of all the lands, of which he makes the grant; so that with us no lands are allodial, except those of the King's own property, the superiorities which the King reserves in the property lands of his subjects, and manſes and glebes, the right of which is completed by the presbytery's designation, without any feudal grant.

5. Every person who is in the right of an immoveable subject, provided he has the free administration of his estate, and is not debarred by statute, or by the nature of his right, may dispose of it to another. Nay, a vassal, though he has only the *dominium utile*, can subfeud his property to a subvassal by a subaltern right, and thereby raise a new *dominium directum* in himself, subordinate to that which is in his superior; and so *in infinitum*. The vassal who thus subfeuds, is called the subvassal's immediate superior, and the vassal's superior is the subvassal's mediate superior. Professed or known papists are debarred by 1695, c. 26. from granting gratuitous deeds in prejudice of the heir.

6. All persons who are not disabled by law, may acquire and enjoy feudal rights. Persons excommunicated were declared incapable of

R

possessing

Allodial
goods.Who can
grant
feudal
rights.Who can
receive
them.

Aliens
cannot
hold a
feu.

possessing their own lands, and no charter of resignation or of adjudication of lands holden of the crown, was allowed to be passed in their favour, 1609, *c.* 3. 4. ratified by 1661, *c.* 25.; but these disabilities are taken off, 1690, *c.* 28. Papists cannot purchase a land-estate by any voluntary deed, 1700, *c.* 3. Aliens, who owe allegiance to a foreign Prince, cannot hold a feudal right without naturalization; and therefore, where such privilege was intended to be given to favoured nations or persons, statutes of naturalization were necessary, either general, 1558, *c.* 65. 66.—1669, *c.* 7. or special; or, at least, letters of naturalization by the Sovereign. The act 1594, *c.* 216. prohibiting all members of any court of justice to buy claims of heritable rights depending in court, does not annul the sale, though it subjects the buyer to deprivation, *F.* 20. *Dec.* 1683, *Purves.*

What sub-
jects may
be grant-
ed in feu.

*Jus super-
veniens ac-
crescit
emptori.*

7. Every heritable subject, capable of commerce, may be granted in feu. From this general rule is excepted, 1. The annexed property of the crown, which is not alienable without a previous dissolution in parliament. 2. Tailzied lands, which are devised under condition that they shall not be aliened. 3. An estate *in hereditate jacente* cannot be effectually aliened by the heir-apparent, (*i. e.* not entered); but such alienation becomes effectual upon his entry, the supervening right accruing in that case to the purchaser; which is a rule applicable to the alienation of all subjects not belonging to the vendor at the time of the sale. Leases of the rents or revenues of boroughs-royal, whether proceeding from lands, fishings, mills, &c. for more than three years,

years, are prohibited by 1491, c. 36.; but, as there is no prohibition with regard to leases or feus of the lands themselves, these may be effectually granted by the magistrates, notwithstanding the statute, *New Coll.* 22.

8. The feudal right, or, as it is called, in-vestiture, is constituted by charter and seisin. Feudal charter. By the charter, we understand that writing which contains the grant of the feudal subjects to the vassal, whether it be executed in the proper form of a charter or of a disposition. Charters by subject-superiors are granted, either, 1. *A me de superiore meo*, when they are to be holden, not of the granter himself, but of his superior. This sort is called a public holding, because vassals were in ancient times publicly received in the superior's court before the *pares curiæ* or co-vassals. Or, 2. *De me, de me*, where the lands are to be holden of the granter. These were called sometimes base rights, from *bas*, lower, and sometimes private, because, before the establishment of our records, they were easily concealed from third parties; the nature of all which will be more fully explained, *tit.* 7. An original charter is that by which the fee is first granted: A charter by progress is a renewed disposition of that fee; *e. g.* a charter by a superior to the heir of his vassal, or by a vassal to a singular successor, to be holden of the granter's superior, or a charter of adjudication. All doubtful clauses in charters by progress ought to be construed agreeably to the original grant; and all clauses in the original charter are understood to be implied in the charters by progress, if there be no express alteration, *Cr.* 190. § 27.—299. § 9.

9. The

Its constituent parts.

The narrative.

The dispositive clause.

A clause of *novodamus*.

The *tenendas*.

9. The first clause in an original charter, which follows immediately after the name and designation of the granter, is the narrative or recital, which expresses the causes inductive of the grant. If the grant be made for a valuable consideration, it is said to be onerous; if for love and favour, gratuitous. In the dispositive clause of a charter, the subjects made over are described either by special boundaries or march-stones, (which is called a bounding charter), or by such other characters as may sufficiently distinguish them. In this clause is also expressed the order of succession, and limitation of the fee, which were, by our more ancient style, inserted in the clause of *tenendas*. A charter regularly carries right to no subjects but what are contained in this clause, tho' they should be mentioned in some other clause of the charter. In charters by progress, a clause of *novodamus* is sometimes thrown in, whereby the superior grants of new (*de novo*) certain subjects specially mentioned. Such charters have the effect of an original grant, as to these subjects; and consequently imply a release to the vassal, of all burdens affecting their property, prior to such grant. They are generally no more than renewed rights of some subject that had been formerly granted to the vassal: Yet every subject contained in the clause of *novodamus* is deemed to be conveyed to the vassal, though there should have been no antecedent title to it in his person, 29. Feb. 1680, *Scott*.—14. July 1737, *Heirs of Spey*.

10. The clause of *tenendas* (from its first words *tenendas prædictas terras*) expresses the particular tenure by which the lands are to be holden,

holden, and frequently contains a long and unnecessary enumeration of the parts and pertinents of the subject made over in the charter. The clause of *reddendo* (from the words *red-* ^{The red-} *dendo inde annuatim*) specifies the particular du- ^{dendo.} ty or service which the vassal is to pay or perform to the superior; and hence the duty itself, to which the vassal is subjected, has got the name of the *reddendo*.

11. The clause of warrandice (warranty) is ^{Clause of} that by which the granter obliges himself, that ^{warran-} the right conveyed shall be effectual to the re- ^{dice.} ceiver. Warrandice is either personal or real. Personal warrandice, where the granter is only ^{Personal} bound personally, is either, 1. Simple, that he ^{warran-} shall grant no deed in prejudice of the right; ^{dice is ei-} and this sort, which is confined to future deeds, ^{ther sim-} is implied even in donations. Or, 2. Warran- ^{ple,} dice from fact and deed, by which the granter ^{or from} warrants, that the right neither has been nor ^{fact and} shall be hurt by any fact of his. This is gene- ^{deed,} rally granted, where rights are compounded for less than the sums contained in them; and sometimes the clause is so conceived as to reach also to the deeds of the granter's ancestors or authors, from whom he himself derives his right. Or, 3. Absolute warrandice *contra omnes mor-* ^{or abso-} *tales*, (warrandice at all hands, and against ^{lute.} all deadly), whereby the right is warranted against all legal defects in it, which may carry it off from the receiver, either wholly or in part. Where a sale of lands proceeds upon an one- rous cause, the granter is liable in absolute warrandice, tho' no warrandice be expressed; but, ^{Implied} in assignations to debts or decrees, no higher ^{warran-} warrandice ^{dice.}

warrandice than from fact and deed is implied, *F. 4. March 1707, Riddel*; which is also the doctrine of the Roman law, *l. 4. de hered. vel act. vend.*

How far
grants by
the crown
imply
warran-
dice.

Absolute
warran-
dice in the
assigna-
tion of a
debt.

12. Warrandice cannot extend to burdens which may affect the subject after the grant, whether they shall arise from misfortune, *e. g.* inundation, or from statute: For the receiver, as he has the whole benefit arising from its improvement after that period, must run all the hazards of its deterioration, *12. July 1667, Watson*. Nay, this doctrine holds, where the supervening burden is imposed under the authority of a public law prior to the grant; unless the receiver, who is presumed to know the burden which by law may be imposed on the subject, has taken care to secure himself against it, by express warrandice, *1. July 1676, L. Auchintoul*; see *Harc. 963*. Gratuitous grants by the Crown, imply no warrandice; and though warrandice should be expressed, the clause is ineffectual, from a presumption, that it has crept in by the negligence of the Crown's officers. But where the Crown makes a grant, not *jure coronae*, but for an adequate price, the sovereign is in the same case with his subjects, and liable to the same degree of warrandice with them, according to the nature of the right. Absolute warrandice in the assignation of a debt, imports only that the debt is really due, and free from all legal exceptions, but not that the debtor is solvent; and this holds, though the sums contained in the debt should be warranted to be effectual to the assignee, *12. Dec. 1671, Liddel*.

13. Abso-

13. Absolute warrandice, in case of eviction, affords an action to the grantee, against the grantor, for making up to him all that he shall have suffered through the defect of the right; and not simply for his indemnification by the grantor's repayment of the price to him. This obtains, not only in irredeemable, but in redeemable grants; for, in both, the warrandice strikes against all defects in the right itself; yet, as warrandice is penal, and consequently *stricti juris*, it is not easily presumed, nor is it incurred from every light servitude that may affect the subject, 21. *June 1672, Sandilands*. Regularly the grantee, when the eviction is threatened, ought to intimate his distress to the grantor, that he may defend the right granted by himself; but, though such intimation should not be made, the grantee does not lose his right of recourse, unless it shall appear, that in the process of eviction he has omitted a relevant defence, or subjected himself to an incompetent mean of proof, 23. *June 1681, Clerk.—Falc. vol. 2. 2.*

14. Real warrandice is either, 1. Express, whereby, in security of the lands principally conveyed, other lands, called warrandice-lands, are also made over, to which the receiver may have recourse, in case the principal lands be evicted. Or, 2. Tacit, which is constituted by the exchange or excambion of one piece of ground with another; for, if the lands exchanged are carried off from either of the parties, the law itself, without any paction, gives that party immediate recourse upon his own first lands, which he had given in exchange for the lands evicted, even though

a third person should have acquired a real right in them prior to the eviction, 25. Nov. 1623. *E. Melrofs contra Ker* * : But this holds only, where the grant, by which the lands are exchanged, is expressly said to be an excambion.

Precept
of feisin.

15. The charter concludes with a precept of feisin, which is the command of the superior granter of the right to his bailie, for giving feisin or possession to the vassal, or his attorney, by delivering to him the proper symbols. Possession was, in the infancy of feus, given by the superior himself to the vassal, immediately upon granting the charter, in presence of the *pares curiae* (the name given to the co-vassals, who were equal to one another in the superior's court); and this was styled the proper investiture, by which the vassal's right was completed *unico contextu*. Precepts or letters of feisin, when they were first introduced, were made out in writings separate from the charter; but now all precepts, on charters flowing from the crown, must be ingrossed in the charter or disposition, by act 1672, c. 7. which by custom was soon extended to the case of all precepts without distinction. Any person, whose name may be inserted in the blank, left in the precept for that purpose, can execute the precept as bailie; and whoever has the precept of feisin in his hands, is presumed to have a power of attorney from the vassal, for receiving possession in his name.

Proper
investi-
ture.

Precepts
must now
be in-
grossed
in the
charter.

Instru-
ment of
feisin,

16. A feisin is the instrument or attestation of a notary, that possession was actually given by the superior or his bailie, to the vassal
or

* See 14. July 1629, *L. Wards*.

or his attorney; and it sometimes gets the name of infestment, though that word, in its proper sense, signifies the whole feudal right, *Cr.* 187. § 18. For a long time, the appending of the bailie's seal to the superior's charter or precept, *Cr.* 238. § 2. and sometimes his separate declaration, that he had given seisin, completed the vassal's right, without the attestation of a notary: But afterwards, a notorial instrument came to be considered as a necessary solemnity, not suppliable, either by a proof of natural possession, or even of the special fact, that the vassal was duly entered to the possession by the superior's bailie.

17. The symbols, by which the delivery of possession is expressed are, for lands, earth and stone; for rights of annualrent payable forth of land, it is also earth and stone, with the addition of a penny money; for parsonage-teinds, a sheaf of corn; for jurisdictions, the book of the court; for patronages, a psalm-book, and the keys of the church; for fishings, net and coble; for mills, clap and happer, &c. The seisin must be taken upon the ground of the lands, except where there is a special dispensation, as in the seisins of *Nova Scotia*, *St.* 2. 3. 18. Seisins given, not by the bailie in virtue of a precept, but *propriis manibus* of the granter are generally used in rights granted to wives, children, or other conjunct persons. When such seisin is neither subscribed by the granter, nor supported by a separate warrant from him, it is null, being the bare assertion of a notary, *P. Falc.* 28.

18. A short abbreviate of all seisins, whether flowing from the crown, 1540, c. 79. or from

S

from

at first
not used,now an
essential
solemnity.Symbols
used in
seisins.Seisin pro-
priis ma-
nibus.Registra-
tion of
seisins.

from a subject, 1555, *c.* 46 &c. was directed to be entered into a record of exchequer, for the benefit of all having interest; but a more certain provision was made in the reign of James VI. for the security of purchasers and creditors, by an unprinted statute passed at Falkland, 31. July, and recorded in the books of sederunt, 3. Nov. 1599; and by another, made in the year thereafter, mentioned in the index of the unprinted acts, 1600, No. 34, whereby the full tenor of seifins, &c. was to be registered in the secretary's register, within forty days after their date, under the certification of nullity. These statutes were but little observed, *Act S. 6. Jan. 1604*; wherefore, a third act was made, 1617, *c.* 16. directing all seifins, and other real rights, therein mentioned, to be registered within sixty days after their date, either in the general register of seifins at Edinburgh, or in the register of the particular shire appointed by the act; which, it must be observed, is not, in every case, the shire within which the lands lie.

except seifins of burgage tenements:

That exception now taken off.

19. This act does not, as the two former, render unregistered seifins null; they are indeed declared ineffectual against third parties, but they are valid against the granters and their heirs. From this statute were excepted seifins of burgage tenements, probably from an opinion of the exactness, with which the town-clerks, who alone could be notaries thereto, 1557, *c.* 27. booked them in their protocolls or registers, which lie open to all the lieges; but, as this exactness sometimes failed, 30. *June 1668, Burnet*, burgage seifins

feins were ordained to be registered in the books of the borough, 1681, c. 11 *.

20. The attestation of the keeper of the records on the back of the feisin, that it was registered, was deemed a sufficient registration, 1686, c. 19. : But as this weakened the security intended from the records to singular successors, the actual booking of feisins, and of other writings presented for registration, is now required, 1696, c. 18. Seisins regularly recorded, are preferable, not according to their own dates, but the dates of their registration, 1693, c. 13. †, the reason whereof may be gathered from the next act, 1693, c. 14.

21. Seisin necessarily supposes a superior by whom it is given; the right, therefore, which the sovereign, who acknowledges no superior, has over the whole lands of Scotland, is constituted, *jure coronae*, without feisin. In several parcels of land, that lie contiguous to one another, one feisin serves for all, unless the right of the several parcels be either holden of different superiors, or derived from different authors, *July 1729, Bank of Scotland*, or enjoyed by different tenures under the same superior. In discontiguous lands, a separate feisin must be taken on every parcel, unless the sovereign has united them into one tenandry, by a charter of union; in which case, if there is no special place expressed, a feisin taken on any part of the united lands, will serve for the whole, even though they be situated in different shires. The only effect of union is, to give

* See 24. *July 1666, Thomson.*

† Vid. *Stewart Ans. v. Seizin.*

give the discontiguous lands the same quality as if they had been contiguous, or naturally united; union, therefore, does not take off the necessity of separate seifins, in lands holden by different tenures, or the rights of which flow from different superiors, these being incapable of natural union. Where the sovereign unites lands, he generally, in the clause of union, declares the symbol of earth and stone to be sufficient for expressing the delivery, not only of the lands themselves, but of all other feudal rights or subjects conveyed by the charter, let them be ever so different in their natures, *e. g.* fishings, mills, patronages, &c.

Barony
implies
union.

22. The privilege of barony carries a higher right than union does, and consequently includes union in it as the lesser degree. This right of barony can neither be given, nor transmitted, unless by the crown, *St. 2. 3. 45.*; but the quality of simple union, being once conferred on lands by the sovereign, may be communicated by the vassal to a sub-vassal, *25. Jan. 1627, Stuart.* Though part of the lands united or erected into a barony, be sold by the vassal to be holden *a me*, the whole union is not thereby dissolved; what remains unsold retains the quality. These, and all other feudal privileges, must be granted in the charter, not in the seisin; for the seisin is not intended to confer any new right, but merely for completing such right as is before given by the charter.

All pri-
vileges
must be
expressed
in the
charter.

A charter
becomes
real only
after sei-
sin.

23. A charter, not perfected by seisin, is a right merely personal, which does not transfer the property, *3. 1. 1.*; and a seisin of itself bears no faith without its warrant: It is the charter

charter and feisin joined together that constitutes the feudal right, and secures the receiver against the effect of all posterior seisins, even though the charters on which they proceed should be prior to his; and, still more, against all qualities burdening his author's right, contained in latent personal declarations or backbonds, which have not been rendered litigious before his feisin.

24. No quality which is designed as a lien or All real
real burden on a feudal right can be effectual ^{burdens}
against singular successors, if it be not inserted ^{must be}
in the investiture. By our former practice, ^{inserted in}
the burden must have been fully expressed in ^{the investiture.}
the feisin, which is made public by the record,
F. 27. Nov. 1711, Lady Monboddoo; but it was
found, *26. July 1737, creditors of Smith*, that
a general reference in the feisin, to the burdens
specially contained in the charter, was sufficient
to make a real burden; for that the charter is
truly a part of the investiture *. If the credi- ^{What bur-}
tors in the burden are not particularly men- ^{dens are}
tioned, the burden is not real; for no perpe- ^{deemed}
tual unknown incumbrance can be created up- ^{real.}
on lands, *July 1734, creditors of Maclellan*.
On the same principle, a faculty reserved to the
granter, to charge the lands with a certain sum
to be paid to any person he shall name, is not
effectual against singular successors, if he does
not properly exercise that faculty, by granting
an

* But the Court has now returned to the former idea
of our law, that there can be no real burden created on
lands, of which the nature and extent is not capable of
being discovered by creditors and purchasers, *21. Feb.*
1765, Stenhouse.

an heritable bond for the sum, and giving seisin thereon, 21. *June 1737, Ogilvies.* Where the right itself is granted with the burden of the sum therein mentioned, or where it is declared void, if the sum be not paid against a day certain, the burden is real ; but, where the receiver is simply obliged, by his acceptance, to make payment, the clause is effectual only against him and his heirs, *P. Falc.* 101.

TIT.

TIT. 4. *Of the several Kinds of Holding.*

FEUDAL subjects are chiefly distinguished by their different manners of holding, which were either ward, blanch, feu, or bur-gage. Ward holding, which is now abolished by 20. Geo. II. c. 50. was that which was granted for military service. Its proper *reddendo* was, *services*, or *services used and wont*; by which last was meant the performance of service, whenever the superior's occasions required it. As all feudal rights were originally held by this tenure, ward holding was *in dubio* presumed. Hence, though the *reddendo* had contained some special service or yearly duty, the holding was presumed ward, if another holding was not particularly expressed.

2. Feu-holding is that whereby the vassal is obliged to pay to the superior a yearly rent in money or grain, and sometimes also in services proper to a farm, as ploughing, reaping, carriages for the superior's use, &c. *nomine feudi firmæ*. It has a strong resemblance to the Roman *emphyteusis*, in the nature of the right, the yearly duty payable by the vassal, the penalty in case of not punctual payment, and the restraint frequently laid upon vassals by their feu-charters not to alien without the superior's consent; but all clauses *de non alienando* are now prohibited by the foresaid statute for abolishing

abolishing ward holdings. This kind of tenure was introduced for the encouragement of agriculture, the improvement of which was considerably obstructed by the vassal's obligation to military service. The statute which first mentions it is 1457, c. 71. though it appears to have been a tenure known in Scotland as far back as *leges burgorum*, c. 100.

Blanch-
holding.

When
blanch
duties can
be exacted
after the
year.

3. Blanch holding (not unlike the *feudum francum* of the Lombards) is that whereby the vassal is to pay to the superior an elutory yearly duty, as a penny money, a rose, a pair of gilt spurs, &c merely in acknowledgment of the superiority, *nomine albae firmae*. This duty, where it is a thing of yearly growth, if it be not demanded within the year, cannot be exacted thereafter; and, where the words *si petatur tantum* are subjoined to the *reddendo*, they imply a release to the vassal, whatever the quality of the duty may be, if it is not asked within the year. The Lords of Exchequer were, by 1606, c. 14. prohibited to exact money as the value of such blanch duties as are by the charter payable, not in money, but in other subjects, as a pair of gloves, a stone of wax. By our present practice, such duties are sometimes converted in the investitures themselves, to a certain sum in money; but, even where they are not, their values continue to be exacted by the crown.

Burgage-
holding.

4. Burgage-holding is that by which boroughs-royal hold of the sovereign the lands which are contained in their charters of erection. This, in the opinion of *Craig*, 81. § 36. does not constitute a separate tenure, but is a species of ward-holding; with this speciality, that the vassal is not a private person, but a community:

ty: And indeed, watching and warding, which is the usual service contained in the *reddendo* of such charters, might be properly enough said, some centuries ago, to have been of the military kind. As the royal borough is the King's vassal, all burghage-holders hold immediately of the crown: The magistrates, therefore, when they receive the resignations of the particular burgesses, and give seisin to them, act not as superiors, but as the King's bailies specially authorised thereto by 1567, c. 27.

The borough itself is the vassal.

5. Feudal subjects, granted to churches, monasteries, or other societies for religious or charitable uses, are said to be mortified, or granted *ad manum mortuam*; either because all casualties must necessarily be lost to the superior, where the vassal is a corporation which never dies; or because the property of these subjects is granted to a dead hand, which cannot transfer it to another. In lands mortified in times of Popery to the church, whether granted to prelates for the behoof of the church, or *in puram eleemosynam*, the only services payable by the vassal were prayers, and singing of masses for the souls of the deceased, which approaches nearer to blanch-holding than ward. The purposes of such grants having been, upon the Reformation, declared superstitious, the lands mortified were annexed to the crown: But mortifications to universities, hospitals, &c. were not affected by that annexation; and lands may, at this day, be mortified to any lawful purpose, either by blanch or by feu holding.

Mortification.

TIT. 5. *Of the Casualties due to the Superior.*

Fixed
rights of
superiori-
ty.

The year-
ly *reddendo*
is *debitum*
fundi.

Personal
services a-
bolished.

Casual
rights of
superiori-
ty.

THE right of the superior continues unimpaired notwithstanding the feudal grant, unless in so far as the *dominium utile*, or property is conveyed to his vassal: His infestment in the land subsists, and his heir is entitled to be vested, not in the superiority only, but in the lands themselves, of which his ancestor had made over the property. Hence, he can shew all real actions concerning the lands, against every person other than the vassal, or those deriving right from him; See 19. Nov. 1624, *L. Lag.* The superiority carries a right to the services and annual duties contained in the *reddendo* of the vassal's charter. The duty payable by the vassal is a *debitum fundi*; i. e. it is recoverable not only by a personal action against himself, but by a real action against the lands. The services with which he is charged, if they are annual, as ploughing, cutting of corns and hay, &c. must be exacted within the year, 30. Jan. 1624, *L. Carnoufy*. The services of personal attendance, by hosting, hunting, watching, and warding, due by vassals, are abolished, 1. Geo. 1. St. 2. c. 54; and, in lieu thereof, the superior is entitled to a certain annual payment, to be fixed by the Court of Session, if the parties themselves cannot settle it.

2. Besides the constant fixed rights of superiority, there are others, which, because they depend upon uncertain events, are called casualties.

fualities. The casualties proper to a wardholding, while that tenure subsisted, were ward, recognition, and marriage. The casualty of ward is that, whereby the superior was entitled to the full rent of the ward lands, after the vassal's death, during the heir's minority; because the heir, in that period, was incapable of performing military service. This casualty was not known in the feudal law, which allowed the minor to serve by a substitute, *lib. 2. feud. t. 26. § 4. vers. si minori*, § 5; but it was received by us as early as the reign of *Malcolm Mackenneth*: And at first, it comprehended the office of tutor of law to the heir, the remains of which continued till the reign of James VI. *Cr. 394. § 13,—Skene, voce Varda.*

3. The right arising to the superior from this casualty could not be hurt by any debt or deed of the vassal, not consented to by the superior. But, 1. if the superior was charged by an adjudging creditor of his vassal to enter him, in consequence of 1469, *c. 37.* the ward falling thereafter, by the death of the vassal and the minority of the heir, was burdened with the adjudger's debt. 2. By 1457, *c. 71.* Either the ward vassals, holding of the crown, were allowed to sublet their lands, in feu holding; and the feuers were secured against the ward of their immediate superiors, on payment to the crown of the yearly feu duty contained in their charters, while the ward continued. Under colour of this act, the power of subfeuing was assumed by the vassals of subject-superiors: But these were prohibited to subfeu without the content of the superior, by 1606, *c. 12.*; and the prohibition is extended to the crown's vassals, by 1633, *c. 16.*

4. Ward

or perpetual.

Taxed ward.

How ward expired.

Recognition.

4. Ward was burdened with the charge of upholding the houses, inclosures, &c. in good condition during the heir's minority, and with an alimony to the heir, if he had no separate means of subsistence, 1491, c. 25.—1535, c. 15. It was also affected with the terce due to the vassal's widow, and wholly excluded by the courtesy belonging to the surviving husband of the last female vassal; for these, being the provisions of law, were effectual without the superior's consent. It was sometimes restricted by the investiture, to a certain sum to be paid annually by the minor-heir, in place of the full rents: This was called *taxed* ward, and the other *simple* ward: The taxed duties were *debita fundi*. Ward regularly expired at the heir's age of twenty one years, if a male; in females, it lasted only till fourteen, which was the age at which women were marriageable by our old law; *R. M. l. 2. c. 48. § 1.*—*Skene, voce Varda*. In the case of co-heiresses, the ward determined at the eldest's age of fourteen; for heirs-portioners are proprietors *pro indiviso*, and so each of them is vassal in every part of the ward-lands.

5. Recognition was not simply a casualty, but a total forfeiture of the ward-lands, arising to the superior from the alienation, by the vassal, of more than the half thereof to a stranger, without the superior's consent. By the feudal customs, it was only the part aliened which recognised, *lib. 2. feud. t. 38*. It was originally introduced, that the superior might not, by the vassal's alienation of his lands, lose the benefit of his services, *ib. l. 2. t. 52. § 1*. It took place in all ward holdings, even taxed; but in no other holding, without an express

express clause in the charter. Legal alienations ^{Was in-} by adjudication, drew no forfeiture after them; ^{ferred by} but all voluntary deeds, whereby the lands ^{all volun-} were either sold or burdened, did infer it, as ^{tary alie-} wadsets or rights of annualrent; but not rights ^{nations,} of warrandice, because these are not present deeds of alienation. A right of annualrent, though granted over the whole ward-lands, inferred no recognition, if the sum thereby secured did not exceed the half of their value; nor an improper wadset, when the back-tack duty was not above the half of the yearly rents, 7. *July 1681, Hay.* Where there was no right effectually aliened, *e. g.* if the charter or feisin were intrinsically null, recognition was not incurred.

6. An action for declaring recognition to ^{of the} have fallen, might have been brought, even ^{vassal,} against a minor, on deeds of alienation granted by his ancestor, 1. 7. 25. But a vassal, whose lands were subject to a right of redemption in favour of another, though he might, by alienation, forfeit the interest which he himself had in the subject, could not hurt the reverser's right: Nor could deeds granted by a vassal inhibited, posterior to the inhibition, hurt the right of the creditor inhibitor, 1686, *c.* 15. All were deemed strangers to the vassal, but those who were *alioqui successuri*, *i. e.* those who, if ^{to a stran-} they had survived him, must necessarily have ^{ger.} succeeded to him, though there had been no disposition: Recognition was therefore incurred by the vassal's alienation to his brother, though he was at that time next in succession, because the vassal might have afterwards had heirs of his own body, 29. *July 1672, Lord Hatton;*
and

and by a wife's alienation to her husband, *Edg.* 13. *Jan.* 1725, *Sir Ja. Hall.*

The superior's confirmation secured against it.

7. A purchaser, buying from a ward vassal the smallest part of his lands, was not secure without the superior's confirmation; for, if the vassal should have afterwards sold what, with the first purchase, exceeded the half, both the first and last alienations, and all likewise that remained unsold, recognised to the superior. The superior's confirmation of an infestment, after disposing the major part, though it secured the right confirmed against the effect of the prior alienations, might be brought in *computo* with subsequent ones, so as to make the rest of the ward lands recognise, *P. Falk.* 53. But a charter of *novodamus* to the vassal implied a confirmation of all prior deeds of alienation; and, consequently, hindered them from being conjoined with alienations made after the *novodamus*, so as to infer recognition, *ibid.*

Casualty of marriage.

Single and double avail.

8. Marriage, or *maritagium*, was that casualty by which the ward superior was entitled to receive from the heir of his former vassal, after the age of puberty, a certain sum as the value (avail) of his tocher: In some cases, the single avail was due; in others, the double. This casualty is nowhere mentioned in the feudal customs; but we have received it as far back as the books of the Majesty, *l. 2. c. 48.*: It obtained only in ward holdings, unless where there was a special clause in the charter importing it. In some charters, most commonly in those where the ward was taxed, the casualty of marriage was also taxed to a liquid sum, which, in that case, was *debitum fundi*,

fundi. being of the same nature with the taxed ward-duties.

9. This casualty took its rise, chiefly from Single a-
the right that the superior was understood to ^{vail, when}
have over the person, as well as estate of the ^{due,}
minor-heir, *2. Att. c. 93. § 2.*: Anciently there-
fore it affected only minor-heirs, who after
puberty refused to marry upon the superior's
requisition; but afterwards, the single avail be-
came due, tho' the heir had been major at the
death of his ancestor, and he himself had died,
neither married nor required by the superior
to marry, *3. Jan. 1677, Campbell*. In the
case of heirs portioners, only one marriage
was due, because heirs portioners enjoy the
estate *pro indiviso*, as if they were but one per-
son; tho' the contrary practice obtained in Sir
Th. Hope's time, *Min. Pr. 47. 48*. Marriage
could not possibly fall, where the heir was
married before the ancestor's death, nor where
he had died before puberty. The superior's ex-
press consent to the heir's marriage was consider-
ed as a renunciation of the casualty, *Dirl. 434*.

10. In estimating the avail of marriage, the how esti-
-precise sum got in tocher was not considered, ^{mated.}
but what the heir might, from his fortune, rea-
sonably expect. The court of session, *anno*
1674, fixed the modification of the single a-
vail to three years free rent of the vassal's e-
state, *Dirl. 202.*; afterwards, they brought it
down to two years, *F. 7. Nov. 1701, Baird*.
The double avail was due where the superior, ^{Double a-}
having offered a wife to the heir, who was in ^{vail, when}
all respects his equal, the heir not only refused ^{due;}
the woman offered, but married with another,
2. Att. c. 91. § 2. and c. 93. At first the
double

how estimated.

double avail was estimated at two single avails; but it is generally thought, that, if the quantum of it had been brought into dispute in later times, it would have been reduced to three years free rent of the estate belonging to the vassal. And in the estimation of either of the avails, not the ward-lands only, but all the other free estate of the vassal, was brought in *computo*, both heritable and moveable, 19. *June* 1630, *Somervel*, as it stood at the period when the heir first became marriageable.

Marriage was due only to the eldest superior.

11. Where a vassal held different ward-fees of different superiors, the marriage was due only to one superior, because the heir could be married but once. In such case, the superior, from whom the vassal's ancestors in blood had got the first feudal grant, was entitled to the casualty, as eldest superior, *Q. Att. c. 94.*; since he ought not to be cut out of his right, by the vassal's afterwards acquiring ward-lands from another; but the sovereign, who is the fountain of feudal rights, was always considered as the eldest superior, tho' the grant by the crown to the ancestor of the vassal, whose marriage falls, should have been posterior to the rights of the vassal's other ward holdings. It was enacted in favour of the crown-vassals, who should get their holdings changed from ward to feu or blanch, that they should be exempted from the marriage that might be claimed from them by other superiors, in the same manner as if the lands, whose holding was changed, had still continued to be holden ward, 1661, *c. 58.*

The King always the eldest.

Ward-fees abolished, whether holding of the crown.

12. By the late statute, 20. *Geo. II.* for abolishing ward holdings, the tenure of the lands, holden ward of the crown, is turned into

into blanch, for payment of one penny Scots yearly, *si petatur tantum*; and the tenure of those holden of subjects, into feu, for payment or of a of such yearly feu duty in money, victual, or subject, cattle, in place of all services, as shall be fixed by the Court of Session. The following rules have accordingly been settled, by *Act S. 8. Feb. 1749.* In lands that are held simply ward of a subject, one *per cent.* of the rent is to be paid as a yearly feu duty on account of the marriage, and one *per cent.* as the value of the other casualties consequent upon ward-holding. Where the vassal holds other lands ward of the King, he is not liable in any feu duty on account of the marriage. In lands holden taxed ward of a subject, two *per cent.* of the sum taxed by the charter is to be paid yearly, as the value of all the casualties, whether the vassal holds other lands ward of his Majesty or not. A doubt having arisen, whether the principality-lands were included in this statute, and in what manner the vassals holding of the Prince were to be received, an act passed, 25. *Geo. II. c. 20.* giving or of the Prince, to the King the same powers that had been formerly exercised by the Kings of Scotland over the lands of the principality, when there was no Prince; in consequence of which, his Majesty, by a warrant under the privy-seal, *Jan. 1753,* signified his pleasure, that all lands, formerly holden ward of the Prince, should, for the future, be holden blanch.

13. The only casualty, or rather forfeiture, Irritancy proper to feu holdings, is the loss or tinsel of of feus *ob non solutum canonem.* the feu right, by the neglect of payment of the feu duty for two full years. The act which establishes this irritancy, 1597, *c. 246.* declares that all feuers so failing in payment, shall

lose their feu, in the same manner as if there had been an irritant clause in the right : Yet subsequent practice has made a distinction ; where there is no conventional irritancy, the vassal is allowed to purge the legal irritancy at the bar, that is, he may prevent the forfeiture, by making payment before sentence ; but, where the legal irritancy is fortified by a conventional, he is not allowed to purge, unless where he can give a good reason for the delay of payment, 13. Feb. 1666, *L. Wedderburn*, or where the irritant clause has been doubtfully expressed, 18. Feb. 1680, *E. Mar.*

Non-entry,

ceases upon the heir's entry.

14. The casualties common to all holdings are non-entry, relief, literent escheat, disclaimer, and purpresture. Non entry is that casualty which arises to the superior out of the rents of the feudal subject, through the heir's neglecting to renew the investiture after his ancestor's death. By the written feudal law, the investiture was necessarily to be renewed upon every change either of the superior or vassal, *lib. 2. feud. t. 24. pr.* ; but our customs require no renovation upon the death of the superior. This casualty was introduced, that the superior, while he was without a vassal, might be enabled to provide himself of a proper person to serve him ; the heir therefore, as soon as by entering he becomes capable of serving his superior, returns by our customs to the full enjoyment of his feu ; though by the feudal usages, *ibid.* if he neglected to renew the investiture for year and day, he lost his right for ever.

15. The superior is entitled to this casualty, not only where the heir has not obtained himself infeft, but where his retour is set aside

fide upon nullities. 29. Feb. 1628, E. Nithsf-
dale; for a null retour is equal to none. The What
heir, from the death of the ancestor, till he non-entry
be cited by the superior in a process of general duties are
declarator of non-entry, loses only the retoured due before
duties of his lands; and he forfeits these, citation.
though his delay should not argue any contempt
of the superior, because the casualty is consid-
ered to fall as a condition implied in the feu-
dal right, and not as a penalty of transgression:
But, where the delay proceeds not from the
heir, but from the superior, nothing is forfeited,
not even the retoured duties, 1474, c. 58.—29.
June 1745, Chalmer.

16. For understanding the nature of retoured Retoured
ed duties, it must be known that there was duties.
anciently a general valuation of all the lands
in Scotland, designed both for regulating the
proportion of public subsidies, and for ascer-
taining the quantity of non entry and relief-
duties payable to the superior; which appears;
by a contract betwixt K. R. Bruce and his sub-
jects anno 1327, preserved in the advocates li-
brary, to have been settled at least as far back
as the reign of Alexander III. This valuation Valua-
became, in the course of time, by the improve- tion.
ment of agriculture, and perhaps also by the
heightening of the nominal value of our mo-
ney, from the reign of Robert I. downwards
to that of James III. much too low a standard
for the superior's casualties: Wherefore, in
all services of heirs, the inquest came at last
to take proof likewise of the present value of
the lands contained in the brief, (*quantum nunc
valent*) in order to fix these casualties. The Old and
first was called the old, and the other the new new ex-
extent. Though both extents were ordained, tents.
by

by 1474, *c.* 56. to be specified in all retours made to the Chancery upon brieves of inquest; yet, by the appellation of retoured duties in a question concerning casualties, the new extent is always understood. The old extent continued the rule for levying public subsidies, (*see* 1633, *c.* 1.), till a tax was imposed by new proportions, by several acts made during the usurpation. By two acts of Cromwell's parliament, held at Westminster 1656, *c.* 14. and 25. imposing taxations on Scotland, the rates laid upon the several counties are precisely fixed. The subsidy granted by the act of convention 1667, was levied on the several counties, nearly in the same proportions that were fixed by the usurper in 1656; and the sums to which each county was subjected were subdivided among the individual landholders in that county, according to the valuations already settled, or that should be settled by the commissioners appointed to carry that act into execution. The rent fixed by these valuations is commonly called the valued rent; according to which the land-tax, and most of the other public burdens, have been levied since that time.

Valued
rent.

The re-
toured
duty in
feu-hold-
ings;

in teinds;

17. In feu holdings, the feu duty is retoured as the rent, because the feu duty is presumed to be, and truly was, at first, the rent. The superior, therefore, of a feu-holding gets no non-entry, before citation in the general declarator; for he would have been entitled to the yearly feu-duty, though the fee had been full, *i. e.* though there had been a vassal in the lands. The superior of teinds gets the fifth part of the retoured duty as non-entry, because the law considers teinds to be worth a fifth part
of

of the rent, 2. 10. 10. In rights of annualrent ^{in rights of annual-} which are holden of the granter, the annual-renter becomes his debtor's vassal; and, as the ^{rent;} annualrent contained in the right is retoured *valere seipsam*, the heir of the creditor, while he continued in non-entry, lost the whole interest of the debt due to him: But, by 1690, c. 42. annualrents are only to be retoured to the blanch, or other duty contained in the right. As this act does not extend to the non-entry, after citation in the action of declarator, care is generally taken, in rights of annualrent, to release the creditor from all non-entries, by a special clause.

18. It is because the retoured duty is the pre- ^{in lands not formerly re-} fumed rent, that the non entry is governed by ^{toured;} it. If, therefore, no retour of the lands in non-entry can be produced, nor any evidence brought of the retoured duty, the superior is entitled to the real, or, at least, to the valued rent, even before citation. But, if lands which have been retoured shall be sold out in parcels, the non-entry of each parcel will be restricted to that particular proportion of the retoured duties that such parcel bears to the whole lands, 5. Feb. 1623, *Ker*. In lands formerly ^{and in} holden ward of the King, the heir, in place of ^{lands that} the retoured duties. is, by the act 20. Geo. II. ^{formerly} c. 50, subjected only to the annual payment of ^{held ward of the} one *per cent.* of the valued rent; which valuation, therefore, as well as the old and new ex- ^{crown.} tents, is to be set forth in the retour.

19. The heir, after he is cited by the supe- ^{Non-en-} rior in the action of general declarator, is sub- ^{try duties} jected to the full rents till his entry, because ^{after cita-} his neglect is less excusable after citation. The ^{tion.} decree of declarator, proceeding on this action, entitles

are properly penal.

Non-entry subsequent to ward. What non-entry duties are *debita fundi*.

In what cases non-entry is not due.

entitles the superior to the possession, and gives him right to the rents downward from the citation. As this sort of non-entry is properly penal, our law has always restricted it to the retoured duties, if the heir had a probable reason for declining to enter; see *Dirl.* 273. or if he lay under any incapacity, 24. *July* 1677, Lord *Melvil*, or had ground to believe that he held of another superior, 22. *Jan.* 1706, *Maitland*. While ward-holdings subsisted, the wardat, who had been in possession of the lands, in virtue of the ward, might, even without declarator, continue his possession after the expiration of the ward, till the heir's entry, (which was called non entry subsequent to the ward); but, if he had not attained possession, he was in the common case of other superiors as to the non-entry. The retoured duties due before citation are *debita fundi*, which the superior, as creditor, may recover by a poinding of the ground; but the right which he has to the full duties that fall after citation does not accrue to him as creditor, but as *interim dominus* of the rents, in which character he can make the rents effectual, by a petitory action against tenants and intromitters, improperly called a special declarator.

20. In boroughs, each particular burghs holds of the King the special subject contained in his investment; and therefore, by the general rule, non-entry ought to take place against them, as it does against other vassals: Yet it is certain that non-entry does not obtain in burghage-holdings, *Hope's Min. Pr.* 96. because the incorporation of inhabitants holds the borough itself, *i. e.* the whole incorporated subjects of the King; and there can be no non-entry due in lands

lands granted to communities, because there the vassal never dies : This covers the right of particulars from non-entry ; for, if non-entry be excluded with regard to the whole, it cannot obtain with regard to any part. Neither can non-entry fall when the fee is full by investments of property, either flowing from, or confirmed by the superior ; or even by the reserved liferent of the fiar ; *St. 4. 8. 7.* It is also excluded, as to a third of the lands, by the terce, during the widow's life, and as to the whole of them, by the courtesy, during the life of the husband. But it is not excluded by a precept of teisin granted to the heir till seisin be taken thereon. Non entry falls by the vassal's resigning his fee to the superior in favour of a third party ; and it continues till seisin be taken by the resignatary, *St. 3. 2. 12.* A superior intest, who is charged by the heir to enter him, is barred, *personali exceptione*, from the non entry duties, so long as he refuses to receive him. Where the superior is not entered, and so is not in a capacity to receive the heir, and yet refuses to make up his titles upon a charge, he forfeits the non-entry duties during his life, 1474, c. 58.

21. Three seisins proceeding upon retours, Bygone or on precepts granted by the superior to three consecutive heirs, presume that all preceding non entries are satisfied. A charter of *novodamus* imports a discharge of all casualties incurred prior to its date, 12. Feb. 1713, *Erskine*. Entry by the heir, on a precept voluntarily granted by the superior, reciting that the ancestor died seised in the lands, imports a discharge of all bygone non-entries incurred before the death of that ancestor, *St. 4. 8. 7.* ;
but

non-entries how excluded.

but charters or precepts by the superior, upon charges directed against him, do not exclude his claim for past duties; since these, being granted in obedience to the law, imply a reservation of former claims.

Relief;

when due
in feu-
holdings;

22. Relief is that casualty which entitles the superior to an acknowledgment or consideration from the heir, for receiving him as vassal. It is called relief, because, by the entry of the heir, his fee is relieved out of the hands of the superior. There is no mention of this casualty in the books of the feus; but, by our ancient feudal customs, not only proper vassals, by whatever tenure they held, were liable in relief, *R. M. l. 2. c. 71.* but even naked possessors of lands paid to their masters, upon their entry, a duty much resembling it, *Q. Att. c. 23.*—*Skene, voce Herezelda*; so that it might be thought that feu-holding, when that tenure came to be introduced, ought also to have been subject to it: Nevertheless, relief was found not due in feu holdings flowing from subjects, unless where it was expressed in the charter, by a special clause for doubling the feu-duty at the entry of an heir, 24. Nov. 1736, *E. Dundonald*; but, in feu rights holden of the crown, our ancient law is observed; for the precept issuing from the Chancery for infefting the heir, directs the sheriff to take security for their relief, though there should be no such clause in the charter. The superior can recover this casualty, either by a pointing of the ground, as a *debitum fundi*, or by a personal action against the heir, who, if the lands hold of the crown, is subjected, by his taking a precept of feisin from the Chancery, tho' he should not infeft himself upon it, 12. March

1628,

1628, L. *Lauriston*. In blanch and feu-hold-ings, where this casualty is expressly stipulated, a year's blanch or feu-duty is due in name of relief, beside the current year's duty payable in name of blanch or feu-farm. In ward-holdings, the superior, if he was in possession by the ward, continued another year in possession on account of the relief; otherwise, he was entitled only to the retoured duty. No composition or abatement of the relief-duties can be given to the crown's vassals, 1587, c. 73. How estimated.

23. Escheat (from *eschecoir*, to happen or fall) Escheat. anciently signified any casualty or forfeiture, by which a right fell from the proprietor, or accrued to another, *Q. Att. c. 48.*; but it has been since restricted to that special forfeiture which falls through a person's being denounced rebel. It is either single or liferent. Single escheat, though it does not accrue to the superior, must be explained in this place, because of its coincidence with liferent. Single escheat.

24. After a debt is constituted, either by a formal decree, or by registration of the ground of debt, which, to the special effect of execution, is in law accounted a decree; the creditor may obtain letters of horning, issuing from the signet, commanding messengers to charge the debtor to pay or perform his obligation within a day certain. Where horning proceeds on a formal decree of the Session, the time indulged by law to the debtor is fifteen days; if upon a decree of the commission of teinds, it is ten, 1633, c. 8. By our former law, horning on a charge of ten days followed upon the decrees of all inferior judges, 1593, c. 177.—1606, c. 10.; but, by our present practice, on fifteen, which is probably owing to a misinterpretation

of 1612, *c.* 7. Yet horning still proceeds on admiral-decrees upon ten days, according to the directions of 1609, *c.* 15. Where it proceeds on a registered obligation, which specifies the number of days, that number must be the rule; and, if no precise number be mentioned, the charge must be given on fifteen days, which is the term of law, unless where special statute interposes; as in bills, upon which the debtor may be charged on six days, 1681, *c.* 20.

their execution;

25. The messenger must execute these letters (and indeed all summonses) against the debtor either personally, or at his dwelling house; and, if he get not access to the house, he must strike six knocks at the gate, and thereafter affix to it a copy of his execution, 1540, *c.* 75. If payment be not made within the days mentioned in the horning, the messenger, after proclaiming three oyesles at the market cross of the head borough of the debtor's domicile, and reading the letters there, blows three blasts with a horn, by which the debtor is understood to be proclaimed rebel to the King, for contempt of his authority; after which, he must affix a copy of the execution to the market cross. This is called the publication of the diligence, or a denunciation at the horn. Where the debtor is not in Scotland, he must be charged on sixty days, and denounced at the market-cross of Edinburgh, and pier and shore of Leith.

form of denunciation;

its consequences.

26. Denunciation, if registered within fifteen days, either in the sheriff's books, 1579, *c.* 75. or in the general register, 1600, *c.* 13. drew after it the rebel's single escheat, *i. e.* the forfeiture of his moveables to the crown. So severe a penalty, with the character of rebel, affixed to denunciation on civil debts, was probably

bably owing to this, that antiently letters of horning were not granted, but to enforce the performance of facts in one's own power, *Books S. 1. March 1563-4*; and, when afterwards they came to be issued upon liquid debts, *1584, c. 139.* the legislature neglected to soften the penalty: In so much, that those who were denounced even for a civil cause, might be put to death with impunity, till *1612, c. 3.* Persons denounced rebels have not a *persona standi in judicio*; they can neither sue nor defend in any action, *Falc. vol. 2. 113.* But this incapacity, being unfavourable, is personal to the rebel, and cannot be pleaded against his assignee.

27. Persons cited to the Court of Justiciary Denunci- may be also denounced rebels, either for ap- ation in
pearing there with too great a number of at- criminal
tendants, or, if by failing to appear, they are causes.
declared fugitives from the law. In the first
case, the denunciation must be made at the
head borough of the shire where the court
is held, and may be registered either in the
books of the shire of the rebel's domicile, or
in the books of adjournal of the Justiciary,
1584, c. 140.; and, in the last case, it is effectual,
if used within six days after the sentence of fu-
gitation, at the market cross of Edinburgh,
1592, c. 126. Single escheat falls without de- S. Escheat
nunciation, upon sentence of death pronoun- may fall
ced in any criminal trial; and, by special sta- without
tute, upon one's being convicted of certain denuncia-
crimes, though not capital, as perjury and tion.
bigamy, *1551, c. 19.* detorcement and breach
of arrestment, *1581, c. 118.* and ulury, *1597,*
c. 247. By the late act abolishing ward-hold- Escheat
ings, the casualities both of single and liferent upon
escheat are discharged, when proceeding upon debts
denunciation now dis-
charged.

denunciation for civil debts ; but they still continue when they arise from criminal causes. All moveables belonging to the rebel at the time of his rebellion, (whether proceeding upon denunciation, or sentence in a criminal trial), and all that shall be afterwards acquired by him until relaxation, fall under single escheat. Bonds bearing interest, because they continue heritable *quoad fiscum* by 1661, c. 32. fall not under it, nor such fruits of heritable subjects as become due after the term next ensuing the rebellion, these being reserved for the liferent escheat. Tacks or leases, though they are heritable as to succession, 2. 2. 2. fall under it, unless they be liferent tacks, 1617, c. 15.; and even liferent tacks, and all other liferent rights, in the person of an assignee, fall as single escheat; *infr.* § 32.

Subjects
falling by
S. escheat.

Bonds
bearing
interest
fall not
under it,

but tacks
do.

What
debts are
a burden
upon sin-
gle es-
cheat.

28. Our former law allowed the treasury to levy the escheat goods summarily, 1579, c. 75. without hearing the person denounced upon any objections that might have been competent to him ; but, by the later practice, the King never retains the right of escheat to himself, but makes it over to a donatary, whose gift is not perfected, till, upon an action of general declarator, it be declared that the rebel's escheat has fallen to the Crown by his denunciation, and that the right of it is now transferred to the pursuer by the gift in his favour, 8. Nov. 1710, *Borthwick* : Every creditor, therefore, of the rebel, whose debt was contracted before rebellion, and who has used diligence before declarator, is preferable to the donatary ; in so much, that an arrestment used before declarator, tho' not complete by a forthcoming, is effectual against him, 19. Feb. 1667, *Glen*. But the escheat

escheat cannot be effected by any debt contracted, nor by any voluntary deed of the rebel after rebellion, though such deed has been granted in security of a debt prior thereto; since otherwise the rebel would have it in his power to evacuate the escheat. Where the rebel was, before rebellion, obliged to grant a right to his creditor, the right granted after rebellion, in consequence of the prior obligation, is not considered as voluntary; because he might have been compelled to it. Voluntary payment by the rebel, before declarator, of debts contracted before the rebellion, is, from the favour of commerce, sustained against the donatary, 10. Dec. 1673, *Veitch*. The right of escheat is, in every case, burdened with the debt of that creditor on whose horning the escheat fell, 1592, c. 143.; but the crown's power over it is not restrained in favour of any other creditor, 1551, c. 7.—1579, c. 75.

29. The rebel, if he either pays the debt Letters of charged for, or suspends the diligence, may relaxa- procure letters of relaxation from the horn, tion. which, if published in the same place, and registered fifteen days thereafter, in the same register with the denunciation, 1579, c. 75. have the effect to restore him to his former state; but they have no retrospect, as to the moveables already fallen under escheat, without a special clause for that purpose.

30. The rebel, if he continues unrelaxed for Liferent year and day after rebellion, is construed to be escheat. civilly dead: And therefore, where he holds any feudal right, his superiors, as being without a vassal, are entitled, each of them, to the rents of such of the lands belonging to the rebel as holds of himself, during all the days of the rebel's natural life, by the casualty of life-
rent.

rent-escheat; except where the denunciation proceeds upon treason or proper rebellion, 1535, c. 32.; in which last case the liferent falls to the King.

To whom
this right
falls.

31. The liferent escheat of an apparent heir falls to the superior of the lands, as if the heir were entered; for his neglect ought to be neither profitable to himself, nor hurtful to his superior. The liferent of a purchaser of lands not infest cannot fall by this casualty; for, till his right be completed by seisin, he can have no superior: The rents, therefore, of such lands, while the rebel is unrelaxed, fall to the King, who, by the rebellion, has right to all the rebel's moveable estate that is not appropriated to liferent escheat, 22. *July 1675, Menzies contra Kennedy.* In feudal rights which require no seisin, the liferent accrues to him who would have been superior in the right, had it required seisin. By this rule, the liferent-escheat of a widow having a right of terce, or of a husband having a right of courtesy, falls to the superior of the lands liferented, *Hope, (Horning) 12. July 1622. Maxwell;* and the escheat of ministers glebes and stipends, to the King: And it would appear that, by the same principle, the liferent escheat of a liferent-tack ought to fall to the proprietor of the ground from whom the tack flowed.

What is
compre-
hended
under it.

32. It is that estate only, to which the rebel has a proper right of liferent in his own person, that falls under his liferent escheat. A liferent-infestment, therefore, or a liferent tack, when assigned, falls not under the assignee's liferent-escheat, but his single; because the assignee has such right only during his cedent's life, not his own, 2. 9. 24. Hence, if we shall suppose

suppose the liferent of the subvassal to fall first; and then that of the vassal, the subvassal's liferent, after it has accrued to the vassal, must make a part of that vassal's single escheat, and so goes to the King; because the vassal's right to the subvassal's liferent does not depend on his own life, but on that of the subvassal: But, if the liferent-escheat of the vassal should fall first, and thereafter that of the subvassal, the subvassal's escheat must go, as liferent, to his mediate superior, who, by coming in the place of the immediate one, has the same right to the subvassal's liferent that such immediate superior would have had, if he had not been disabled from taking it, by his being year and day rebel, 26. Feb. 1623, *Sibbald*.—24. July 1632, *Rule*.

33. Tho' neither the superior, nor his donatary, can enter into possession in consequence of this casualty, till decree of declarator; yet that decree, being truly declaratory, has a retrospect, and does not so properly counter a new right, as declare the right formerly constituted to the superior, by the civil death of his vassal. Hence, all charters or heritable bonds, though granted prior to the rebellion, and all adjudications, though led upon debts contracted before that period, are ineffectual against the liferent-escheat, unless seisin be taken thereon (*in cursu rebellionis*) within year and day of the granter's rebellion, after which he becomes *civiliter mortuus*, 28. Nov. 1710, *Ld. Al. Hay*.

34. Here, as in single escheat, no debt contracted after rebellion can hurt the donatary, at what time soever the diligence thereupon, or the rights granted for its security, may have been completed; nor any voluntary right granted after that period, though in security or satisfaction

It is contrary, constituted without declarator.

With what debts it is burdened,

Donatary's right not complete till declarator.

Rules of preference between gifts of liferent.

Difference between liferent-escheat and other casualties.

Simulate gifts of escheat.

satisfaction of prior debts. Tho' the superior's right be fully established by the lapse of year and day, yet it is the decree of declarator upon the gift, which first vests that right in the donatary, that before remained with the superior; see 19. *June* 1669, *Scot*; hence, in a competition between two donataries, the gift first declared, tho' last in date, is preferable. Where neither of the donataries have obtained decree, he is preferred whose summons was first executed, 31. *Jan.* 1635, *L. Renton*. All other things being equal, priority in date is the rule of preference.

35. In other casualties, as ward, non-entry, recognition, &c. the superior is not obliged to acknowledge any right affecting the feu, which is not either confirmed by himself, or established by law; because, where the casualty arises from the genuine nature of the feudal grant, his right to it cannot be impaired by any fact of his vassal: But liferent-escheat is burdened with all rights granted before, and completed in the course of the rebellion, tho' not confirmed by the superior; because that casualty is not so natural to feudal rights as the others, and is only superinduced upon the feudal plan by our special customs.

36. Gifts, whether of single or liferent escheat, when granted for the behoof of the rebel himself, are null, as being simulate, *i. e.* intended for a cover to the rebel against his creditors, 1592, *c.* 145. This statute presumes simulation, from the rebel's being suffered by the donatary to possess the escheat-goods by himself or near relations; yet a gift may be taken, without challenge, directly to the rebel's son, if such son can prove himself creditor to his

his father : Or to the wife or children of the rebel from considerations of compassion, where the gift bears expressly to be for their alimony and subsistence, *Bank. b. 3. t. 3. § 28.* A presumption of simulation also arises from the gift's being obtained by the rebel's interest ; but this may, where the donatary is creditor, and has given backbond to the Exchequer in favour of the rebel's other creditors, be elided by his own oath, 12. *Dec. 1673, Dickson.* Not only second donataries, but the creditors of the rebel, may object simulation against a gift, if their debts were contracted prior thereto ; see 10. *Jan. 1712, White, and the decisions there referred to.* The rebel himself may, after relaxation, be constituted donatary ; but such gift is considered simply as an extinction of the casualty *confusione*, and cannot exclude creditors from the subject of the escheat.

37. Disclamation is that casualty whereby a Disclavassal forfeits his whole feu to his superior, if he ^{mation.} disowns or disclaims him without ground, as to any part of it, *R. M. l. 2. c. 63. § 6. 9.* Purpresture draws likewise a forfeiture of the whole ^{sture.} feu after it, and is incurred by the vassal's incroaching upon any part of his superior's property, or attempting by building, inclosing, or otherwise, to make it his own, *R. M. l. 2. c. 74. § 1. 8.—1600, c. 5.* In both these feudal delinquencies, the least colour of excuse saves the vassal.

38. All grants from the crown, whether ^{Signa-} charters, gifts of casualties, or others, proceed ^{tures.} on signatures which pass the signet. When the King resided in Scotland, all signatures were subscribed by him ; but, on the accession of James VI. to the crown of England, a catcher or
Y seal

seal was made, having the King's name engraved on it, in pursuance of an act of the Privy Council, 4. *Apr.* 1603, with which all signatures were to be afterwards sealed, that the Lords of Exchequer were impowered to pass; and these powers are transferred to the Court of Exchequer, which was established in Scotland after the union of the two kingdoms in 1707, 1. 3. 17. Grants of higher consequence, as remissions of crimes, gifts proceeding upon forfeiture, and charters of *novodamus*, must have the King's sign-manual for their warrant.

Great
seal.

39. If lands holding of the crown were to be conveyed, the charter passed, before the union of the kingdoms in 1707, by the great seal of Scotland, and now by a seal substituted in place thereof by 1707, c. 7. § 24. Grants of church-dignities, during episcopacy, passed also by the great seal; and the commissions to all the principal officers of the crown, as Justice Clerk, King's Advocate, Solicitor, &c. do so at this day. The term of expeding charters under the great seal is distinctly set forth, *H. Min. Pr.* 86.—89. All rights which subjects may transmit by simple assignation, the King transmits by the privy seal; as gifts of moveables, or of casualties that require no seisin.

Privy seal.

Quarter
seal.

The quarter seal, otherwise called the testimonial of the great seal, is appended to gifts of tutory, commissions of brevies issuing from the Chancery, and letters of presentation to lands holding of a subject, proceeding upon forfeiture, bastardy, or *ultimus heres*. While the practice continued, of writing charters, and their precepts of seisin, upon separate parchments, this seal was appended to precepts proceeding

ceeding on such charters as had passed the great seal.

40. Seals are to royal grants, what subscrip-^{The use of} tion is to rights derived from subjects, and seals. give them authority : They serve also as a check to gifts procured (*subreptione vel obreptione*) by concealing the truth, or expressing a falsehood ; for, where this appears, the gift may be stopped before passing the seals, tho' the signature should have been signed by the King. By 1672, c. 7. all rights passing under the great or privy seal must be registered in the registers of the great or privy seal *respective*, before appending the seal.

TIT. 6. *Of the Right which the Vassal acquires by getting the Feu.*

UNDER the *dominium utile* which the vassal ^{*Dominium utile ;*} acquires by the feudal right, is comprehended the property of whatever is considered what is as part of the lands, whether of houses, woods, ^{compre-} inclosures, &c. above ground ; or of coal, ^{hended} limestone, minerals, &c. under ground. Mills ^{under it.} Mills. have, by the generality of our lawyers, been deemed a separate tenement, and so not carried by a charter and disposition, without either a special clause conveying mills or the erection of the lands into a barony. It must be admitted that a mill is capable of being made a separate tenement, by separating it from the lands by a disposition, since it is, in that case, susceptible of a seisin ; but, before such separation,

tion, it is entirely *quæstio voluntatis*, whether it will be carried by a conveyance of the lands : And it is certain that, if a proprietor builds a mill on his own lands, it will be carried by his entail, or by a retour, without mentioning it. If the lands disposed be astricted, or thirled to another mill, the purchaser is not allowed to build a new corn-mill on his property, even though he should offer security that it shall not hurt the thirle ; which is introduced for preventing daily temptations to fraud, *New Coll.* 54.

Dove-
cotes.

2. Proprietors are prohibited to build dove-cotes, unless their yearly rent, lying within two miles thereof, extend to ten chalders of victual, 1617, *c.* 19. * : All dove-cotes are presumed to have been built before this prohibition, if the contrary be not proved. A purchaser of lands, with a dove-cote, is not obliged to pull it down, though he should not be qualified to build one in terms of the act ; but, if it becomes ruinous, he cannot rebuild it, 19. *Jan.* 1731, *Kinloch*. The right of brewing, tho' not expressed in the grant, is implied in the nature of property, *P. Falc.* 14. ; as are also the rights of fishing, fowling, and hunting, in so far as they are not restrained by statute. Steel-bow goods, *i. e.* corns, straw, cattle, or instruments of tillage, delivered by a landlord to the tenant upon his entry, for the like in quantity and quality, to be redelivered to him at the end of the lease, pass with the lands to the purchaser, if the purchase be made by a rental ; for, as the tenant has been thereby enabled to give

Right of
brewing.

Steel-bow
goods.

* See *New Coll.* 1. 23.

give an higher rent, for which the purchaser is presumed to pay a just price, the purchaser would lose that very rent for which he has paid, if the steel-bow goods were not esteemed part of his purchase: But, in a bargain which is made without reference to a rental, the steel-bow, which is in itself a moveable subject, is not carried by the disposition.

3. There are certain rights naturally consequent on property, which are deemed to be reserved by the crown as *regalia*, unless they be specially conveyed. Gold and silver mines are of this sort: The first universally; and the other, where three half-pennies of silver can be extracted from the pound of lead, 1424, c. 12. (three half-pennies in the reign of James I. is equal to about two shillings five pennies of our present Scots money, according to Mr Ruddiman, *Pref. to Diplom. Scot. p. 82.*). These were, by our ancient law, annexed to the crown; but, by an unprinted act, 1592, No. 12. they are dissolved from it; and every freeholder, (that is, as to this question, every proprietor, tho' he should hold his lands of a subject, 8. Dec. 1739, *D. Argyll*), is entitled to a grant of the mines within his own lands, with the burden of delivering to the crown a tenth of what shall be brought up, 12. Jan. 1750, *E. Hopeton*. This unprinted statute mentions also tin and copper mines, as if these were *inter regalia*.

4. Salmon-fishing is likewise a right understood to be reserved by the crown, if it be not expressly granted; but forty years possession thereof, where the lands are either erected into a barony, or granted with the general clause of fishings, establishes the full right of the salmon-

Forestry. mon-fishing in the vassal *. A charter of lands, within which any of the King's forests lie, does not carry the property of such forest to the vassal. In charters granted with the right of a free forestry, the vassal was entitled to the privileges belonging to a King's forest, which see in 1592, c. 128.—1594, c. 210. These were so grievous to the neighbouring proprietors, that the Court of Session gave their opinion for applying to the crown, against the future erection of lands into a forestry, 24. June 1680, *M. Athole*.

Res publicae now
inter regalia.

Right of a
free port.

Pertinents.

5. All the subjects which were by the Roman law accounted *res publicae*, as rivers, highways, ports, &c. are, since the introduction of feus, held to be *inter regalia*, or in *patrimonio principis*; and hence, encroachments upon a highway is said to infer purpresture, *R. M. l. 2. c. 74. § 1.* No person has the right of a free port without a special grant, which implies a power in the grantee to levy anchorage and shore-dues, and an obligation upon him to uphold the port in good condition. In this class of things, our forefathers reckoned fortalices, or small places of strength, originally built for the defence of the country, either against foreign invasions, or civil commotions; but these now pass with the lands in every charter.

6. The vassal acquires right by his grant, not only to the lands specially contained in the charter, but to those that have been possessed forty years as pertinent thereof. But, 1. If the

* The statutes which regulate salmon-fishing are, 1424, c. 11.; 1424, c. 35.; 1477, c. 74.; 1489, c. 15.

the lands in the grant are marked out by special limits, the vassal is circumscribed by the tenor of his own right, which excludes every subject without these limits from being pertinents of the lands, 17. Nov. 1671, *Young*. 2. A right possessed under an express infeftment is preferable, *caeteris paribus*, to one possessed only as pertinent. 3. Where neither party is infeft *per expressum*, the mutual promiscuous possession by both, of a subject as pertinent, resolves into a commonty of the subject possessed: But, if one of the parties has exercised all the acts of property of which the subject was capable, while the possession of the other was confined to pasturage only, or to casting feal and divot; the first is to be deemed sole proprietor, and the other to have merely a right of servitude.

7. As barony is a *nomen universitatis*, and unites Privileges the several parts contained in it into one indi- of barony. vidual right, the general conveyance of a barony carries with it all the different tenements of which it consists, though they should not be specially enumerated, (and this holds even without erection into a barony, in lands that have been united under a special name, 23. March 1622, *Ld. Borthwick*). Hence likewise the possession by the vassal of the smallest part of the barony-lands preserves to him the right of the whole. The privilege of barony, though it carries no right of itself to the *regalia*, without a special grant, has the effect to transmit, from the baron to his heir or successor, such of them as the baron himself had formerly a right to, 15. Jan. 1668. *E. Argyll*.

8. The vassal is entitled, in consequence of his property, to levy the rents of his own lands, and

and to recover them from his tenants by an action for rent before his own court; and from all other possessors and intruders, by an action of mails and duties before the sheriff. He can also remove from his lands tenants who have no leases, and he can grant tacks or leases to others.

Tack or lease.

A tack is a contract of location, whereby the use of land, or any other immoveable subject, is set to the lessee or tacksmen for a certain yearly rent, either in money, the fruits of the ground, or services. It ought to be reduced into writing, as it is a right concerning lands.

Verbal tack.

Tacks, therefore, that are given verbally, to endure for a term of years, are good against neither party for more than one year, 16. *July 1636, Keith*. An obligation to grant a tack is as effectual against the granter as a formal tack*. A liferenter, having a temporary property in the fruits, may grant tacks to endure for the term of his own liferent

What is included in the right of tack.

9. The tacksmen's right is limited to the fruits which spring up annually from the subject set, either naturally, or by the industry of the tacksmen; he is not, therefore, entitled to any of the growing timber above ground, and far less to the minerals, coal, clay, &c. under ground, the use of which consumes the substance, 15.

Tacks, though in themselves personal,

Feb. 1668, Colquhoun. Tacks are, like other contracts, personal rights in their own nature, and consequently ineffectual against singular successors in the lands, whose right reaches to the removing of tenants from their own property, notwithstanding any tack they may have got from the former proprietor. To make tacks real,

* *Kilk. Tack, No. 9.*

real, they were sometimes executed of old in the form of charters, and perfected by seisin; but all tacks were, by 1449, c. 17. for the encouragement of agriculture, declared effectual to the tacksmen for the full time of their endurance, into whose hands soever the lands might come.

10. To give a written tack the benefit of this statute, it must mention the special tack-duty payable to the proprietor, which, though small, if it be not elusory, secures the tacksmen; and it must be followed by possession, which supplies the want of a seisin: If therefore the setter (or lessor) shall be divested of the property before the term of the tenant's entry, the tack is not good against a singular successor; for a tenant can have no possession on his tack till that term, *Dirl.* 346. If a tack does not express the term of entry, the entry will commence at the next term after its date, agreeable to the rule, *Quod purè debetur, præsentì die debetur*. If it does not mention the *isth*, i. e. the term at which it is to determine, it is good for one year only; but, if the intention of parties to continue it for more than one year, should appear from any clause in the tack, e. g. if the tenant should be obliged to lead annually a certain quantity of coals, it is sustained for two years, as the *minimum*, 22. Nov. 1737, *Ridpath*. Tacks granted to perpetuity, or with an indefinite *isth*, have not and the benefit of the statute, *Gilm.* June 1666, *Dobie*. If a tack has the essential characters of a contract, it is effectual against the grantor and his heirs, though it should have none of the solemnities necessary to bring it within the statute, e. g. though it were granted for perpetuity, 26.

are now
in certain
respects
real
rights.

Requisites
of a real
tack.

It must be
followed
by possession;

and the
isth must
be definite.

July 1631, *Crichton*, or were not clothed with possession*.

Tacks of
mills ;—

and of
houses
within
borough.

11. Tho' this act mentions only tacks of land, custom has by analogy extended it to tacks of mills, salmon-fishings, and collieries, all which are subjects *fundo annexa* ; but tacks of houses within borough do not fall within the act. because these are, by the more common practice, set from year to year, *F. 5. Feb. 1680, Rae*, cited in *Dictionary*, vol. 2. p. 417. The statute does not defend the tacksmen against the landlord's superior, when the fee opens to him by non-entry ; for the superior is not bound to regard any deed of his vassal not consented to by himself ; but, upon the heir's entry, the tacksmen's right, which before lay dormant, revives, and continues for as many years as the tack had to run when he was first excluded. The same doctrine obtained in ward.

A clause
of reten-
tion, if
good a-
gainst
singular
successors.

12. If the tack-duty be made payable, not to the fetter himself, but to one of his creditors ; or if the tacksmen be allowed retention thereof, by his lease, in payment of a debt due to himself by the fetter, such clause is unavailable against singular successors † ; for the statute was only designed to secure tacksmen in their possessions, not the creditors to whom the tack-duty might be made payable. The contrary doctrine would render tacks equal to rights of wadset ; and consequently, as tacks need not be registered, would destroy the security intended for purchasers by the records : Singular successors therefore can, in such case, sue the tacksmen

* Vide *Dict.* vol. 3. p. 423. ; *Wight and Kirk. Tack*, No. 6.

† Vide *Kirk. Tack*, No. 6.

men for the duties contained in their tacks ; but where the tacksmen himself is the creditor, the clause of retention will defend him, as to all tack-duties prior to litiscontestation, or other legal interpellation, *Falc. vol. 1. 240.* Tacks, being *quodammodo* real rights, entitle the tacksmen to an action of mails and duties, or of removing, against possessors ; and, if he has been seven years in possession upon his tack, he has the benefit of a possessory judgment, whereby he may continue his possession, even against one having a preferable right, till his tack be formally reduced, 4. 1. 25.

13. Tacks necessarily imply a *delectus persone* Tacks are
nae, a choice by the setter of a proper person *stricti*
 for his tenant. Hence the conveyance of a *juris*
 tack, which is not granted to assignees, is ineffectual without the landlord's consent. A right of tack, though it be heritable, falls under the *jus mariti*, because it cannot be separated from the labouring cattle and implements of tillage, which are moveable subjects, *Jan. 1734, Hume.* A tack therefore granted to a single woman falls by her marriage, because the marriage, which is a legal conveyance thereof to the husband, cannot be annulled. This implied exclusion of assignees is however limited to voluntary, and does not extend to necessary assignments, as an adjudication of a tack by the tacksmen's creditor ; but a tack, expressly excluding assignees, cannot be carried even by adjudication, *Falc. vol. 1. 217.* Liferent tacks, because they im- Liferent
 port a higher degree of right in the tacksmen, tacks are
 than tacks for a definite term, may be assigned, *assignable*
 unless assignees be specially excluded : These,
 therefore, when granted to a woman, do not
 fail

fall by marriage, though *Craig* asserts the contrary, 279. § 6.

Tacksmen
may sub-
set.

Effect of a
subtack.

14. It is not a fixed point, whether a tacksmen may subset the lands, without an express power of subsetting. Lord *Stair*, 2. 9. 22. and *Mackenzie, h. t.* affirm he cannot; but it was adjudged, *Harc.* 055. that he might, even where the tack excluded assignees, *per expressum*; far more ought he to have this power, where the exclusion of assignees is only implied*. A subtack requires the same solemnities, and has the same effects as a principal tack: It defends against singular successors; and the principal tacksmen cannot, by renouncing his tack to the setter, hurt the right of the subtacksmen. An assignee to a tack is personally liable to the setter, not only for the current tack duties, while his assignation subsists, but for those that remained unpaid at the date of the assignation; for he comes in place of the cedent, or principal tacksmen, and so is bound as fully as he; yet without extinguishing the obligations under which the cedent himself was laid by the original tack. A subtacksmen may pay his tack-duty to the principal tacksmen whole tenant he is; but the latter is preferable on it, in as far as it remains unpaid, in a competition with the other creditors of the principal tacksmen, 31. Jan. 1665, *Anderson*.

Tacit re-
location,

15. If neither the setter nor tacksmen shall properly discover their intention to have the tack dissolved at the term fixed for its expiration, they are understood, or presumed, to have entered into a new tack upon the same terms with

* Vid. *Kilk. Tack*, No. 7.

with the former, *l. 14. loc. cond.* ; which is called *tacit relocation*, and continues till the landlord warns the tenant to remove, or the tenant renounces his tack to the landlord : This obtains also in the case of moveable tenants, who possess from year to year without written tacks. In judicial tacks set by the Court of Session, where cautioners are always interposed, *tacit relocation* cannot subsist on the same footing with the written tack, because the cautioners in these tacks are loosed from their engagement at the expiration of the term to which they had bound themselves; neither is there any deed of the court, by which their consent to continue such tack can be inferred ; for they are not in use to warn their tacksmen to remove. Judicial tacksmen are therefore accountable as factors after the expiration of their tacks, *Dec. 1719. Bethune.*

16. Rentals (now seldom used) were a sort of *liferent tacks*, *arg. 1587, c. 68.* granted either to the lineal successors of the ancient possessors, or to those whom the landlord designed to favour as such, for an easy or favourable tack-duty. These tacksmen had the name of kindly tenants or rentallers ; and at their entry they paid a certain sum, as a present to the landlord for their right, more or less, according to the custom of the barony. If the rental was not delivered in writing to the rentaller, it could not operate against the landlord's singular successors ; but an enrolment of the tenant as a rentaller, in the landlord's rental-book, was effectual against the landlord himself, and his heirs. A rentaller who assigned his right without the landlord's consent, was punished for his ingratitude, by the forfeiture of his rental ;

has no place in judicial tacks.

Rentals.

A rentaller who assigns forfeits

whereas, his rental.

whereas, in common tacks, there is no forfeiture; the assignation is only null, except in the case of an assignation by marriage, which is explained above, § 13. Where the rental was granted to the rentaller personally, it was found to last only during the joint lives of the fetter and rentaller, 5. *July 1625, Ayton*; contrary, both to the nature of liferent-tacks, and to the opinion of *V. Stair*, 2. 9. 20. Where it was granted to the rentaller and his heirs, it determined upon the death of the first heir, 13. *March 1632, Abannay*, conformable to *l. 14. C. de usufr.*

How long
rentals
endure.

Obliga-
tions up-
on the fet-
ter in
tacks of
land;

in tacks of
houses.

17. In tacks of land, the fetter is commonly bound to put all the houses and office-houses, necessary for the farm, in good condition at the tenant's entry; and the tenant must keep them, and leave them so at his removal. But, in tacks of houses, the fetter must not only deliver to the tenant the subject set, in tenantable repair, at his entry, but uphold it in that repair during the whole years of the tack; and, if it should become insufficient before the ish, tho' without the fetter's fault, the tack-dnty must either be entirely remitted, or suffer an abatement, in proportion to the damage sustained by the tenant, 2. *Jan. 1667, Hamilton*,—*P. Faic. 10.*

Obliga-
tions on
the tackf-
man;

18. A tenant, if his landlord should refuse the victual rent, when offered in due time, is liable only for the prices as fixed for the sheriff fiars of that year; but, if he has not timeously offered his rent in kind, he must pay the value at the ordinary prices of the country; and, over and above, make good to the heritor the damages incurred by him through the not delivery,

livery, if, *e. g.* he should be thereby disabled from performing a contract with a merchant to whom he had sold his farms. If the inclemency of the weather, inundation, or calamity of war, should have brought upon the crop an extraordinary damage, (*plus quam tolerabile*), the landlord had, by the Roman law, no claim for any part of the tack-duty: If the damage was more moderate, he might exact the full rent, *l. 25. § 6. locati*. It is no where defined, what degree of sterility or devastation makes a loss not to be borne; but the general rule of the Roman law seems to be made ours, by *Dirl.*

108. Tenants are obliged to pay no cesses nor public burdens to which they are not expressly bound by their tacks; but the law itself divides the burdens of the schoolmaster's salary equally between the proprietor and his tenants, 1696, *c. 26*. Clauses were formerly thrown into most tacks, obliging tenants to services indefinitely, under the name of arriage and carriage, or services used and wont; but, by the act abolishing ward-holdings, tenants are exempted from all services that shall not be specially mentioned, either in their tacks, or in a separate writing, except mill-services, which continue as formerly.

19. Tacks may be evacuated during their currency, 1. In the same manner as feu-rights, by the tacksmen's running in arrear of his tack-duty for two years together. This irritancy, though it was, by our former practice, triable only by the Court of Session, may now be declared before the Judge-ordinary, by *Act S. 14. Dec. 1756*; but it may be prevented by the tenant's making payment at the bar before sentence.

sentence. Where the tenant either runs in arrear of one year's rent, or leaves his farm uncultivated at the usual season, the Judge-ordinary, when applied to by the proprietor, is required by the said *Act S.* to ordain the tenant to give security for the arrears, and for the rent of the five following crops, if the tack shall subsist so long; otherwise, to decern him to remove, as if the tack was at an end. 3. Tacks may be evacuated at any time, by the mutual consent of parties, *e. g.* by the tacksmen's renunciation accepted by the proprietor; but verbal renunciations may be refiled from.

upon
their de-
termina-
tion.

20. The tenant, who intends to quit his possession at the ish of his tack, ought, in Craig's opinion, 268. § 3. to deliver a written renunciation thereof to his landlord, forty days before the term of Whitsunday, at or immediately preceding the ish; but renunciations are now seldom reduced into writing, when they are not to have effect before the ish. The landlord, when he wanted to remove a tenant, whose tack was expiring, or who possessed without a tack, might, by our old custom, upon a previous verbal notice given to him, eject him *via facti*, the very day after the term at which he was obliged to remove, *Cr.* 268. § 4. But, by 1555, *c.* 39. the tenant, upon a precept signed by the landlord, must be warned forty days preceding the term of Whitsunday before described, personally, or at his dwelling-house, to remove at that term, with his family and effects. This precept must be also executed on the ground of the lands, and thereafter read in the parish church where the lands lie, after the morning service, and affixed to the most patent door

Warning.

door thereof. Whitsunday, though it be a moveable feast, is, in questions of removing, fixed to the 15th of May, by 1690, c. 39. In warnings from tenements within borough, it is sufficient that the tenant be warned forty days before the ish of the tack, whether it be Whitsunday or Martinmas, 21 Nov. 1671, *Riddel*; and, in these, the ceremony of chalking the door is sustained as a warning, when proceeding upon a verbal order from the proprietor, though without the warrant of a magistrate, 24. June 1709, *Barton*.

21. This process of warning was precisely necessary for founding an action of removing against tenants, till the above quoted *Act S. 14. Dec. 1756*, which leaves it in the option of the proprietor, either to use the order prescribed by 1555, c. 39. or to bring his action of removing before the Judge ordinary; which, if it be called forty days before the said term of Whitsunday, shall be held as equal to a warning. Where the tenant is bound by an express clause of his tack, to remove at the ish of it without warning, such obligation is, by the said act, declared to be a sufficient warrant for letters of horning, upon which, if the landlord charges his tenant forty days, before the said Whitsunday, the judge is authorized to eject him within six days after the term of removing expressed in the tack.

22. Actions of removing might, even before this act of federunt, have been pursued without any previous warning, 1. Against vicious possessors, *i. e.* persons who had seized the possession by force, or who, without any legal title, had intruded into it, after the last possessor had

Warning is not now precisely necessary.

Extraordinary actions of removing.

had given it up. 2. Against possessors who had a naked tolerance. 3. Against tenants who had run in arrear of rent, during the currency of their tacks, *P. Falc.* 13. 4. Against such as had sold their lands, and yet continued to possess after the term of the purchaser's entry; for such possession is without a title. Upon the same ground warning was not required, in removings against possessors of liferented lands, after the death of the liferenter who died in the natural possession: But if he possessed by tenants, these tenants could not be disturbed in their possessions till the next Whitsunday, that they might have time to look out for other farms. *Cr.* 270. 13.; but they might be compelled to remove at that term, by an action of removing, without warning, 16. *Feb.* 1628, *Thomson*. In the case of a liferent-tack, no action of removing was, before the above quoted *Act S.* 14. *Dec.* 1756, competent on the death of the tacksmen against his representatives, without a previous warning, in terms of the act 1555, 13. *Feb.* 1630, *L. Rowallan*; for, in every case where the proprietor had granted a tack, warning was necessary*.

The landlord's title in a removing.

23. A landlord's title in a removing, let it be ever so lame, cannot be brought under question by a tenant whose tack flows immediately from him; but, if he is to assist against tenants, not his own, his right must be perfected by intestment, unless it be such as requires

no

* A tacksmen of a colliery may be sued to remove summarily, without warning, *Stair. b. 2. t. 9. § 23.* and *Dec.* 15. 1767, *Wauckope*.

no infeftment, as terce, &c. The feifin itfelf is a fufficient title againft tenants who cannot fhew a better ; but, if the defender has a real right in the lands, the purfuer muft alfo produce the relative charter. The feifin muft be dated prior to the precept of warning ; otherwife the precept will be null, as granted *a non habente potestatem* ; and confequently, the removing alfo which is founded on it : But, if an heir fhould, before entry, warn a tenant to remove, his bare right of apparency will fupport the warning, if he fhould ferve heir and infeft himfelf on his fervice, prior to the citation in the fubfequent action of removing ; 28. *July 1637, E. Haddington*. If a proprietor is to remove a tenant, whose right is derived from one who has been in poffeffion, he ought to make that perfon a party to the fuit.

24. The defender, in a removing, muft, before offering any defence which is not instantly verified, give fecurity to pay to the fetter the violent profits, if they fhould be awarded againft him, 1555, c. 39. Thefe are fo called, becaufe the law confiders the tenant's poffeffion after the warning as violent. They are eftimated, in tenements within borough, to double the rent ; and in lands, to the higheft profits the purfuer could have made of them, by poffeffing them, either by a tenant, or by himfelf.

25. If the action of removing fhall be paffed from, or if the landlord fhall, after uſing warning, accept of rent from the tenant, for any term fubfequent to that of the removal, he is prelumed to have changed his mind, and tacit relocation takes place. All actions of removing againft the principal or original tackfman, and decrees

Violent profits.

Effect of warning not infifted in.

Decrees of removing effectual againft affignees.

decrees thereupon, if the order be used, which is set forth *supr.* § 21, are, by the act of federunt 1756, declared to be effectual against the assignees to the tack, or subtenants.

The landlord's hypothec on the fruits.

Its effects, either by retention,

26. The landlord has, in security of his tack-duty, over and above the tenant's personal obligation, a tacit pledge of hypothec, not only in the fruits, as he had by the Roman law, *l. 7. pr. in quib. caus. pign. contr.*—*l. 61. § 8. de furt.* but in the cattle pasturing on the ground. The corn, and other fruits, are hypothecated for the rent of that year whereof they are the crop, *Mackenzie, b. t. § 12.*; for which they remain affected, though the landlord should not use his right for years together, 25. *July 1623, Hay.* In virtue of this hypothec, the landlord can, 1. Retain the corns upon the ground, though a creditor of the tenant should have legal diligence, ready to be executed against them by poinding. If the poinding be attempted before the term of payment of the tenant's rent, the landlord may stop it, unless sufficient security be offered to him for that year's rent, 21. *Jan. 1737, Crawford.* And, if the tack-duty be payable in victual, the security must be offered for the tenant's specific delivery of the farm-bolls, *Falc. vol. 1. 252.* Tho' the poinder should leave corns on the ground, sufficient for answering the rent, the landlord may stop the diligence; because what is so left may be destroyed or carried off, before the term of payment, till which term the landlord cannot make it his own: But he is not at liberty to stop a creditor's poinding after the term, if sufficiency of corns be left for the rent, because he can instantly appropriate what is so left to his own payment.

27. This hypothec entitles the landlord, 2. or recovery of the
 To recover all corns that are carried off from the tenant, either by legal diligence, or voluntary purchase. Though a tenant, who is liable in silver-rent, cannot well pay it, but by the sale of his corns, the landlord's right extends, in practice, even to that case; and our older decisions carried it still farther, against purchasers in public markets, 29. *March 1639, Hay*, contrary both to equity and public policy. The landlord may bring back the corns, with- either *via*
 out the authority of a judge, if he use his right *facti*,
de recenti, 11. *Dec. 1672, Crichton*; unless where a creditor has made them his own by complete legal diligence, 24. *June 1745, Curry*. But, or by a
 in every case where the landlord has not exercised his right of recovery immediately, he must common
 action.
 make it good by a common process.

28. The whole cattle on the ground, considered as a quantity, are hypothecated for a year's rent, one after another successively. The landlord may apply this hypothec for payment of the past year's rent, at any time within three months from the last conventional term of payment, K. 76. after which it ceases for that year. As the tenant may increase the subject of this hypothec, by purchasing oxen, sheep, &c. so he can impair it, by selling part of his stock; but, if the landlord suspects the tenant's management, he may, by sequestration or poinding, make his right, which was before general upon the whole stock, special upon every individual. A superior has also a hypothec for his feu-duty, of the same kind with that just explained, *Mac-kenzie, h. t. § 12.*

Hypothec
on *investa*
et illata.

29. In tacks of houses, breweries, shops, and other tenements which have no natural fruits, the furniture and other goods brought into the subject set (*investa et illata*), are hypothecated to the landlord for one year's rent, 7. Dec. 1630, Dick: But the tenant may by sale impair this hypothec, as he might that of cattle in rural tenements; and indeed, in the particular case of a shop, the tenant rents it for no other purpose than as a place of sale.

TIT. 7. *Of the Transmission of Rights by Confirmation and Resignation.*

Transmis-
sion of feu-
dal rights.

A Vassal may transmit his feu either to universal successors, as heirs; or to singular successors, *i. e.* those who acquire by gift, purchase, or other singular title. This last sort of transmission is either voluntary, by disposition; or necessary, by adjudication.

The vaf-
fal's pow-
er to
transmit
to a sin-
gular
fucceffor.

2. By the first feudal rules, no superior could be compelled to receive any vassal in the lands, other than the heir expressed in the investiture; for the superior alone had the power of ascertaining to what order of heirs the fee granted by himself was to descend, F. 24. Feb. 1685, Cleland. Hence Craig justly maintained, that no vassal could limit the descent of his feu, to any new order of heirs, without the superior's consent, p. 344. § 20. But this right of refusal in the superior did not take place, 1. In the case of creditors, appraisers, or adjudgers, whom superiors were obliged to receive upon payment of a year's rent, 1469, c. 37.—1672, c. 19. 2. In the case of purchasers of bankrupt estates, who

who were put on the same footing with adjudgers, by 1681, c. 17. joined with 1690, c. 20. The crown refuses no voluntary dispositive, on his paying a composition to the Exchequer of a sixth part of the valued rent.

3. Notwithstanding the general rule above mentioned, indirect methods were in practice fallen upon, to compel superiors to receive all singular successors; e. g. by a bond granted by the vassal, disposing, to the dispositive, who thereupon adjudged the lands: And now, by 20. Geo. II. *for abolishing ward holdings*, the legislature, looking upon vassals as proprietors, and not merely as beneficiaries, has directed superiors to enter all singular successors, who shall have got from the vassal a disposition containing procuratory of resignation; they always receiving the fees or casualties that law entitles them to on a vassal's entry, i. e. a year's rent. As this was enacted merely for the more expeditious making up of the titles of purchasers, without recurring to the former tedious methods, it does not seem to lay superiors under the necessity of entering incorporations, by which the whole casualties of superiority would be forever lost to them.

4. Dispositions, to be holden of the disposer, are transmissions only of the property, the superiority remaining as formerly. This sort does not necessarily require a confirmation by the granter's superior, because his vassal continues the same, notwithstanding the subaltern right granted to the subvassal; but, because the subvassal's property is exposed to the hazard of all the casualties falling by his immediate superior, where confirmation is not adhibited, it is commonly

is now more absolute than formerly.

Base dispositions.

Confirmations of base rights, their effects.

monly applied for ; and, when granted, it secures against all such casualties as entirely carry off, or exhaust the property, *e. g.* forfeiture, recognition, &c. ; but can hardly be explained into a renunciation by the superior of his other casualties arising from the nature of the feudal contract, which infer only a temporary right to the rents, or to any part thereof, *St. 2. 3. 28.*

Base
rights
postponed
to public
by our
former
law ;

5. Base rights, 2. 3. 8. had by our ancient law as strong effects as public ; but, as they might, before establishing the registers, have been kept quite concealed from all but the granter and receiver, it was enacted for the security of purchasers, by 1540, *c. 105.* that whoever purchased lands on an onerous title, and attained possession thereof, should be preferred to persons claiming under a private right, tho' it should bear a date prior to his. Though the opposition runs, by the words of the statute, between onerous rights clothed with possession, and private rights, the act was so explained by custom, that an onerous and public right, whether followed by possession or not, was preferred to a private right, not followed by possession. Where the base right came to be clothed with possession, it was esteemed effectual from that period ; because the presumption of simulation, arising from its latency, was thereby taken off : And indeed, after the act 1617, which ordained the registration of all deeds, private as well as public, the most slender acts of possession were admitted in support of the base right. As this distinction, which was no longer necessary after the establishment of our records, rendered the rights of lands extremely precarious, by frequently resting them on an uncertain proof by witnesses

witnesses of the disponee's possession, all infeft-^{that di-}ments are by 1693, c. 13. declared to be for^{function} the future preferable, according to the date of^{is now ta-} their several registrations; without respect to^{ken off.} the former distinctions of base and public, or of being clothed and not clothed with possession.

6. Dispositions to be holden of the granter's^{Public} superior may be perfected either by confirma-^{rights.}tion or resignation; and therefore they generally contain both precept of seisin and procuratory of resignation. When the receiver is to complete his right in the first way, he takes seisin upon the precept; but such seisin is ineffectual without the superior's confirmation; for^{Confir-} the disponee cannot be deemed a vassal till the^{mation of} superior receive him as such, or confirm the^{public} holding. This confirmation used formerly to^{rights.} be adhibited by the superior upon the back of the charter or disposition granted by the vassal; but, since the acts imposing certain duties on deeds written upon stamped paper and parchment, is always written in a charter apart, in which the superior recites at full length the charter confirmed, and then subjoins his own confirmation or ratification thereof. By the usual style in transmission of lands, the disposition contains an obligation and precept of infeftment, both *a me* and *de me*, in the option^{Seisin ta-} of the disponee; upon which, if seisin is taken^{ken on a} indefinitely, it is construed in favour of the^{precept} disponee, to be a base infeftment, because a^{both a me} public right is null without confirmation: But,^{and de me,} if the receiver shall afterwards obtain the su-^{how con-} perior's confirmation, it is considered as if it^{strued.} had been from the beginning a public right. See 15. July 1680, B. of Aberdeen.

Confir-
mations
of public
rights,
their pre-
ference.

Prefe-
rence in
confirma-
tions from
the crown.

Effect of
confirma-
tion.

Resigna-
tion *ad*
perpetuam
remanentiam;
am;

7. Where two several public rights of the same subject are confirmed by the superior, their preference is governed by the dates of the confirmations, not of the infeftments confirmed; because it is the confirmation which completes a public right. This was specially provided in the case of confirmations from the crown, by 1578, *c.* 66.; but the reason of the rule holds in all confirmations, whether flowing from the crown or a subject-superior; and therefore that statute must be considered merely as declaratory, and not as having introduced any new rule. In confirmations from the crown, it is the charter first passing the seals that is preferred, because the seals are in place of the royal superscription, 26. *Feb.* 1680, *L. Clackmannan*; unless he, who has presented the first signature, has been obstructed in completing his right, by the indirect methods or nimious diligence of his competitor, 6. *Dec.* 1678, *Mill*.

8. Though a public right becomes, by the superior's confirmation, valid from its date, *St.* 2. 3. 28. yet if any mid-impediment intervene betwixt that period and the confirmation, to hinder the two from being conjoined, *e. g.* if the granter of a public right should afterwards grant a base right to another, upon which seisin is taken before the superior's confirmation of the first, the confirmation will have effect only from its own date; and consequently the base right first completed will carry the *property* of the lands, preferable to the public one.

9. Resignation is that form of law, by which a vassal surrenders his feu to his superior; and it is either *ad perpetuam remanentiam*, or *in favorem*. In resignations *ad remanentiam*, where the

the feu is resigned, to the effect that it may remain with the superior, the superior who before had the superiority, acquires, by the resignation, the property also of the lands resigned: And as his infeftment of the lands still subsisted, notwithstanding the right by which he had given his vassal the property, therefore, upon the vassal's resignation, the superior's right of property revives, and is consolidated with the superiority, without the necessity of a new infeftment; so that resignations *ad remanentiam* are truly extinctions, not transmissions of a right. The property returns by this resignation to the superior, with all the burdens charged upon it by the vassal, which ^{how bur-} could have affected any singular successor, as ^{dened.} feus, tacks, rights of annualrent, &c.; for the superior's voluntary accepting of the resignation from the vassal, implies a confirmation of all these. The reason has been already given why it is otherwise, when the fee returns to the superior in virtue of any feudal casualty, 2. 5. 35. This sort of resignation was not ordained to be recorded by the act 1617, for regiltering real rights; which omission, because it weakened the security of singular successors, is now supplied by 1669, c. 3.

10. Resignations *in favorem* are made, not Resignation *in fa-* with an intention that the property resigned ^{vorem,} should remain with the superior, but that it should be again given by him, in favour either of the resigner himself, or of a third party: They have not therefore the effect, like resignations *ad remanentiam*, of divesting the resigner; for the surrender is not attended with ^{does not} ^{divest the} any purpose, or *causa habilis* of transferring ^{resigner} the

till seisin by the resignatory.

the property to the superior, but is only used as a step to convey it to another; consequently the fee remains in the resigner, till the person in whose favour resignation is made, gets his right from the superior perfected by seisin, *Cr.* 436 § 17. And it is, because resignations *in favorem* are but incomplete personal deeds, that our law has made no provision for recording them. Hence the first seisin on a second resignation is preferable to the last seisin upon the first resignation; but the superior, accepting a second resignation, whereupon a prior seisin may be taken in prejudice to the first resignatory, is liable in damages. In all resignations, the vassal surrenders the lands, by giving the symbol of staff and baton on his knee to the superior, who, in the case of a resignation *in favorem*, immediately delivers it to the disponent: And upon this fact, a notorial instrument is extended, which completes the act of resignation. A pen is in practice used for a staff, in the ceremony of resigning.

Form of resignation.

Resignation *pro propriis manibus.*

Symbols of resignation within borough.

11. Resignation may be made either by the vassal himself, *propriis manibus*, or by his procurator, in virtue of the procuratory, or power to resign, contained in the disposition. If the vassal resign *ad remanentiam propriis manibus*, he himself, as well as the notary, must sign the instrument, 1555, c. 38.; which statute is expressed in general terms, though it was perhaps intended to take place, only where the resigner had subscribed no previous obligation or conveyance, that such resignation might not rest solely on the credit of the notary. Tenements within borough had been long resigned erroneously, by the symbols of earth and stone, and such resignations were sustained, in respect of the universal *communis error*, 7. Feb. 1708,

1708, *Calderwood*: But, by *Act S. 11. Feb.* that year, all symbols are prohibited in resignations, other than staff and baton *.

12. By statute 1594, c. 214. the necessity of producing procuratories or instruments of resignation, or precepts of seisin, is dispensed with, where the rights and infeftments themselves have taken effect by possession, for forty years together. Procuratories and precepts were, in those days, written separate from the dispositions on which they proceeded; and the view of the act was, that the validity of the infeftment should not depend upon the preserving of writings, which were considered as little worth the keeping: But now that the procuratory or precept is ingrossed in the deed of alienation, and that tailzies are frequently executed by simple procuratories, such rights, if not supported by some separate deed divesting the granter, cannot stand on the footing of *this act*, (tho' they may, in most cases, be supported by the posterior act of prescription, see 3. 7. 2. 3.), without production of the procuratories; because these are really the deeds of conveyance, which were not designed to fall under the statute. In burgage-tenements, the instrument of seisin contains the whole transaction, without any separate instrument of resignation; and therefore seisin, expressing resignation of these to have been made, constitutes a valid right, even before the lapse of forty years.

13. By our former decisions, one who was vested with a personal right of lands, *i. e.* a right not completed by seisin, effectually divested himself by disposing it to another; after which, no right remained in the disposer, which could

* Vid. *Kilk. Seisin* No. 5.

could be carried by a second disposition, because a personal right is no more than a *jus obligationis*, which may be transferred by any deed, sufficiently expressing the will of the granter. But this doctrine, at the same time that it rendered the security of the records extremely uncertain, was not truly applicable to such rights as required seisin to complete them; and therefore it now obtains, that the granter of a personal right of lands is not so divested, by conveying the right to one person, but that he may effectually make it over afterwards to another; and the preference between the two does not depend on the dates of the dispositions, but on the priority of the seisins following upon them, 21. June 1737, *Bell*; see also 22. Dec. 1738, *Nielson*.

TIT. 8. Of Redeemable Rights.

Redeemable rights containing a reversion.

Wadset.

AN heritable right is said to be redeemable when it contains a right of reversion, or return, in favour of the person from whom the right flows. Reversions are either legal, which arise from the law itself, as in adjudications, which law declares to be redeemable within a certain term after their date; or conventional, which are constituted by the agreement of parties, as in wadsets, rights of annual rent, and rights in security. A wadset (from wad or pledge) is a right, by which lands, or other heritable subjects, are impignorated by the proprietor to his creditor, in security of his debt; and, like other heritable rights, is perfected by seisin. The debtor, who grants the wadset, and has the right of reversion, is called the

the reverser ; and the creditor receiver of the wadset is called the wadsetter.

2. Wadsets were, in the reign of David II. granted in the form of a charter, whereby the reverser impignorated to his creditor the lands therein mentioned, to be enjoyed by him, until payment should be made of the sum lent, *Skene voce Reversion*. But a custom prevailed in the reign of James III. of executing these rights in the form of irredeemable dispositions ; and the right of reversion was granted to the debtor in a separate writing. By this means, wadsetters, who appeared from the face of their rights to be absolute proprietors, had it in their power, by aliening the wadset lands to defeat the reversion competent to the debtor, which, being no more than a personal right, could only affect the wadsetter himself and his heirs, but not his singular successors. To obviate these frauds, all reversions were declared real rights, though made real, granted in writings apart, 1469, c. 28. ; but, as the act did not make their registration necessary in order to give them this effect, the rights of singular successors were rendered insecure, till 1617, c. 16. which ordains reversions in separate writings to be recorded in the same register with seifins, otherwise, not to be effectual against singular successors. Wadsets, by the present practice, are commonly made out in the form of mutual contracts, in which one party sells the land, and the other grants the right of reversion.

3. Obligations to grant reversions, as well as reversions themselves, are directed by this act to be recorded ; these, within sixty days after their date ; and those, within sixty days after

Rever-
sions of
wadsets

if register-
ed in the
register of
reversions.

Eiks to
reversions
must be
registered.

Reversion
*in gremio
juris* need
not be re-
gistered.

Rever-
sions, how
far *stricti
juris*.

ter the wadset is itself made real by seisin. An eik to a reversion is a writing signed by the reverser, acknowledging the receipt of a farther sum lent by the wadsetter, and declaring the wadset not redeemable, till payment of the last debt, as well as of the first. These, as burdens upon, and consequently parts of the reversion, are also real rights, if registered in terms of the statute. Reversions incorporated in the body of the wadset are excepted from this act; because the singular successor in the wadset is, in that case, sufficiently certified of the reversion, though it be not registered, by looking into his own right, which bears it *in gremio*. Reversions of burgage-tenements were in like manner excepted, but these are ordained also to be recorded, by 1681, c. 11.

4. Rights of reversion are generally esteemed *stricti juris*; yet they go to heirs, though heirs should not be mentioned, unless there be some clause in the right discovering the intention of parties, that the reversion should be personal to the reverser himself, 9. Jan. 1662, *E. Murray*. In like manner, though the right should not express a power to redeem from the wadsetter's heir, as well as from himself, redemption will be competent against the heir, 6. Feb. 1630. *Muir*. All our lawyers have affirmed, that reversions cannot be assigned, unless they are taken to assignees, *St.* 2. 10. 7.—*Cr.* 224. § 3. But it is certain, that, from the favour of legal diligence they may be adjudged.

Tack by
the rever-
ser, to
subsist af-
ter re-
demption.

5. Reversions were sometimes burdened with a power to the wadsetter, to hold the lands in tack, for a certain number of years after their redemption; for a tack-duty equal to the inter-
rest

rest of the wadset sums, which was commonly far below the true rent of the lands: Such tacks are, by 1449, c. 18. declared null, if the tack duty be not in some degree proportioned to the rent. Reversions commonly leave the reverser at liberty to redeem the lands *quando-cunque*, without restriction in point of time; but a clause is adjected to some reversions, that, if the debt be not paid against a determinate day, the right of reversion shall be irritated, and the lands shall become the irredeemable property of the wadsetter. Though this condition (*pactum legis commissoriae in pignoribus*) was re-^{Pactum le-}probated by the Roman law, as *contra bonos mo-*^{gis commis-}
res, l. ult. C. de pact. pign.; yet all irritant^{soriae in}
clauses in contracts, infestments, and obliga-^{pignoribus.}
tions, are effectual with us, by *Act S. 27. Nov.*
1592—1661, c. 62. § 14.: Nevertheless, where the irritancy is penal, as in wadsets, in which the sum lent falls always short of the value of the lands, the right of redemption is by indul-^{How far}
gence continued to the reverser, even after the^{it is effec-}
term has expired, while the irritancy is not de-^{tual.}
clared. But the reverser, if he does not take the benefit of this indulgence, within forty years after the lapse of the term, is cut out of it by prescription, 10. *Nov. 1738, Pollock.*

6. If the reverser would redeem his lands, Order of
he must use an order of redemption against the redemp-
wadsetter; the first step of which, is premo-^{tion.}
nition (or notice given under form of instru-^{Premoni-}
tion.) to the wadsetter, to appear at the time
and place appointed by the reversion, then and Voluntary
there to receive payment of his debt, and there-^{redemp-}
upon to renounce his right of wadset. In the^{tion, how}
voluntary redemption of a right of wadset^{executed.}

holden base, it is usual to insert in the wadsetter's renunciation, a procuratory of resignation in the hands of the superior granter of the wadset, *ad remanentiam*; and to register the instrument taken thereupon in the register of reversions: But a renunciation by itself, if duly registered, re-establishes the reverser in the full right of the lands. Where the wadset was granted to be holden of the granter's superior, Letters of regrefs from the superior were necessary by our former law, by which he became bound, again to receive the reverser his old vassal, upon redemption of the lands; but now, since the act 20. Geo. II. c. 50. the superior, though he has granted no such letters, must receive the reverser, on payment of a year's rent, if he produce a disposition from the wadsetter, containing procuratory of resignation. If, at executing the wadset, the superior has granted letters of regrefs, he will be obliged to receive him, without payment of the year's rent. Letters of regrefs are not effectual against singular successors in the superiority, if they are not registered in the register of reversions. All wadsets that remain personal rights, are extinguished by simple discharges, though they should not be recorded.

Confignation of the redemption-money; 7. If the wadsetter either does not appear at the time and place appointed, or refuses the redemption money, the reverser must confign it under form of instrument, in the hands of the person thereto appointed in the right of reversion; or, if no person be named, in the hands of the clerk to the bills, a clerk of Session, or any responsal person. An instrument of confignation, though it proves that the proper solemnities

lemnities were used, yet, being but the assertion of a notary, cannot fix the receipt of consigned money upon the consignatary, without an acknowledgement subscribed by himself. Extrinsic bonds due by the wadsetter to the reverser, cannot be consigned in place of the sums contained in the right of wadset; for compensation is excluded by the reversion itself, which requires consignation in current money: But, where the compensation is founded on an article contained in the wadset right, it will be received, 2. *Jan. 1667, Hog.* This instru-^{its effects.}ment of consignation completes the order of redemption, stops the farther currency of interest against the reverser, and founds him in an action for declaring the order to be formal, and the lands to be redeemed in consequence of it.

8. Declarators of redemption are not competent to the reverser's apparent heir; for an heir before entry has no title to sue on the rights of his ancestor, 19. *Jan. 1672, Lord Lovat*; but they may be insisted in against the wadsetter's apparent heir; because, in chusing a defender, no more is necessary than that he have an interest to oppose the suit: Yet such heir is not entitled to the redemption-money, though the lands should be found redeemed, till he complete his titles, and so be capable of re-instating the reverser in the lands, 10. *Jan. 1665, Campbell.* ^{Declarators of redemption.}

9. Though a right of reversion, which is barely a faculty to redeem, is said not to be assignable without special powers, yet an order of redemption used upon it may be made over to another, because the faculty is, by the order, converted ^{Orders of redemption may be assigned.}

But need
not be re-
gistered.

verted into an established right : The deposited money may doubtless be assigned, and of course the assignee must be entitled to prosecute the redemption. The act 1617, which requires the registration of grants of redemption and renunciations, does not make it necessary to register orders of redemption, tho' these, joined with the decrees of declarator following upon them, are truly legal renunciations, and evacuate the right of wadset, even in questions with singular successors, *Mack. Obs.* on 1617, c. 16.

Till what
period
does the
consigned
money be-
long to the
reverser ?

10. After decree of declarator is obtained, by which the lands are declared to return to the debtor, the consigned money, which comes in place of the lands, becomes the wadsetter's, who therefore can charge the consignatory upon letters of horning, to deliver it up to him; but, because the reverser may, at any time before decree, pass from his order, as one may do from any other step of diligence, the consigned sums continue to belong to the reverser, till that period; and consequently the wadsetter's interest in the wadset continues heritable. If, therefore, decree is not obtained, till after the death of the wadsetter, the redemption-money will belong to the wadsetter's heir, and not to his executors; but, the moment the lands are declared redeemed by the decree, it becomes moveable, because it can be no longer said to be secured on land.

Instru-
ment of
requisi-
tion ;

11. If the wadsetter chooses to have his money rather than the lands, he must require from the reverser, under form of instrument, the sums due by the wadset, in terms of the right.
This

This instrument of requisition did, by the former law, dissolve the real right constituted by the wadset, and consequently made the sums contained in it moveable, 2. 2. 9. ; but, now that provision is generally made by a special clause in the right, that no diligence to be used upon it shall weaken the real security ; the wadset sums, by our present law, continue heritable, notwithstanding requisition. It has been adjudged, that requisition may be passed from by the wadsetter, even after the reverser has consigned the redemption money in consequence thereof, 14. Nov. 1710, *Rofs.* ^{its effects ;} ^{it may be passed from.}

12. Wadsets are either proper or improper. A proper wadset is that whereby it is agreed, that the use of the land shall go for the use of the money ; so that the wadsetter takes his hazard of the rents, and enjoys them without accounting, in satisfaction, or *in solutum* of his interest. 'Tho', therefore, the rent of the lands should be less than the yearly interest of the sum lent, the lands are redeemable upon payment of the bare principal sum, without any claim for bygone interests ; if it amounts to more, the wadsetter is not obliged to impute the surplus (*in sortem*) towards the extinction of the principal sum. Where the wadsetter thus subjects himself to all the chances by which the fruits may be lost, it is a proper wadset, though the reverser should be obliged to pay the public burdens, *Dirl.* 436.—*P. Falc.* 114. See 1661, c. 62. § 13. 14. ^{Wadset proper ;}

13. In an improper wadset, the reverser, if the rent should fall short of the interest, is taken bound to make up the deficiency ; if it amounts to more, the wadsetter is obliged to

to impute the excrescence towards extinction of the capital : And, as soon as the whole sum, principal and interest, are extinguished by the wadsetter's possession, he may be compelled to renounce, or divest himself in favour of the reverser. Where the wadsetter, in place of possessing by himself, grants a back-tack of the lands to the reverser, for payment of the interest of the wadset-sums, as the tack-duty, the wadset is thereby rendered improper ; for the wadsetter has, in that event, no chance of getting more than his interest ; and consequently the redemption is burdened, not only with the payment of the principal sum, but of the interest, or tack-duties remaining unpaid. But this burden is ineffectual against singular successors, if it be not expressed in the right of reversion, or if the back-tack be not recorded in the proper register.

Usurious
wadsets.

14. If the wadsetter be entitled by his right to enjoy the rents without accounting, and if, at the same time, the reverser be subjected to the hazard of their deficiency, such contract is justly declared usurious, by 1661, *c.* 62. ; for, where the wadsetter runs no risk of losing any part of his interest, he should have no chance of drawing more. By another clause in the same act, it was provided, that in proper wadsets granted before the date of the statute, wherein unreasonable advantages had been taken of the debtors, the wadsetter should, during the not requisition of the sum lent, be obliged, either to quit his possession to the debtor, upon his giving security to pay the interest, or to subject himself to account for the surplus-rents, as in improper wadsets. This branch of the statute appears, both from its narrative and the enact-

A proper
wadsetter
must quit
possession,
on the re-
verser's
giving se-
curity.

ing

ing words, to be limited to such wadsets as were granted anterior to the statute; but the subsequent practice has extended it to all wadsets without distinction. Either the reverser himself, or any in his right, *e. g.* a disponee or adjudger, is entitled to make offer of security to the wadsetter, in terms of this statute; but the reverser's personal creditors have no such privilege, since their debts are no titles of possession, 10. *Feb.* 1713, *E. Leven.* The reverser's personal creditors cannot offer security.

15. Infeftments of annualrent, the nature of which has been explained, 2. 2. 3, are also redeemable rights. Right of annualrent does not carry the property of the lands, but it creates a real *nexus* or burden upon the property, for payment of the interest or annualrent contained in the right; and consequently, the by-gone interests due upon it are *debita fundi*. The annualrenter may therefore insist in a real action for obtaining letters of pouding the ground, upon which he may distrain the corns, cattle, or other moveables upon the lands, for payment of his interest. Those corns, &c. in it, so far as they are the property of the debtor himself, may be pouded by the creditor, to the full amount of the debt due to him; but the goods belonging to the debtor's tenant can be pouded only to the extent of the rent due by him to his landlord, as shall be particularly explained, 4. 1. 3. to which extent the annualrenter may, if he pleases, sue the tenant in a personal action, towards the payment of his past interest: And, in a competition for those rents, the annualrenter's preference will not depend on his having uted a pouding of the ground, for his right was completed by the seisin; and likewise a personal action against the tenants.

seisin; and the power of pointing the ground, arising from the antecedent right, is *meræ facultatis*, and need not be exercised, if payment can be otherwise got, *Falc. vol. 2. 1.* As it is only the interest of the sum lent, which is a burden upon the lands, the annualrenter, if he wants his principal sum, cannot recover it either by pointing or by a personal action against the debtor's tenants, but must demand it from the debtor himself, on his personal obligation in the bond, either by requisition, or by a charge upon letters of horning, according as the right is drawn.

Extinction of rights of annualrent.

16. Rights of annualrent, being servitudes upon the property, and consequently consistent with the right of property in the debtor, may be extinguished without resignation. Where they were made out after the old style, 2. 2. 3. formal renunciations were necessary, which it behoved the debtor to record in the register of reversions, because such rights were truly wadsets: But. when rights of annualrent came, by a variation in the form, to be accessory to a personal obligation, which is extinguishable merely by payment or intromission, renunciations were no longer required to the extinction of them; see 8. July 1680, *Rankin*.

Rights of security.

17. Infeftments in security are another kind of redeemable right, (now frequently used in place of rights of annualrent), by which the receivers are infeft in the lands themselves, and not simply in an annualrent forth of them, for security of the principal sums, interest, and penalty, contained in the rights. These rights, when they are granted, not to the creditors for payment of their debts, but to cautioners for relief of their engagements, are called infeftments

Infeftments of relief,

ments of relief. If an infestment in security be granted to a creditor, he may thereupon enter into the immediate possession of the lands or annualrent for his payment; whereas rights of relief are conditional, and have no operation till the cautioner either pays the debt, or is distressed for it, except in the special cases mentioned, 3. ^{have no present effect;}

3. 26. Infestments of relief are granted, not for the behoof of the creditor, who is no party to the right, but for the cautioner's, who therefore may renounce it at his pleasure, *Harc. 617.* ^{renounced in prejudice of the creditor.} But if the creditor, by adjudging the right of relief from the cautioner, shall carry it to himself, the cautioner cannot thereafter renounce it, in prejudice of him who has affected it by legal diligence. Where a right of security is granted either for payment or for relief, not only of debts already contracted, but to be contracted, by the granter, its effect, as to future contractions, is restricted to the debts that shall be contracted prior to the date of the seisin following on it, by 1696, c. 5. This was enacted, because such securities were found by experience to be frequently granted as covers to fraud. Infestments in security are extinguished, as rights of annualrent. ^{Security for debts to be contracted, how limited.}

18. All rights of annualrent, rights in security, and generally whatever constitutes a real burden on the fee, may be the ground of an adjudication, which is preferable to all adjudications, or other diligences, intervening between the date of the right and of the adjudication deduced on it; not only for the principal sum contained in the right, but also for the whole past interest contained in the adjudication. This preference arises from the nature of real debts, or *debita fundi*, and is expressly reserved by the

act 1661, c. 62. establishing the *pari passu* preference of adjudications; but, in order to obtain it for the interest of the interest accumulated in the adjudication, such adjudication must proceed on a process of poinding the ground, *Dalr.* 12.

TIT. 9. Of Servitudes.

Servitude
is either

natural,

legal,

or conventional.

Servitudes by
grant,
and by
prescription.

SERVITUDE is a burden affecting lands, or other heritable subjects, whereby the proprietor is either restrained from the full use of what is his own, or is obliged to suffer another to do something upon it. Servitudes are either natural, legal, or conventional. Nature itself may be said to constitute a servitude upon inferior tenements, whereby they must receive the water that falls from those that stand on higher ground. Legal servitudes are established by statute or custom, from considerations of public policy; among which may be numbered the restraints laid upon the proprietors of tenements within the city of Edinburgh, by 1621, c. 26. and 1698, c. 8. There is as great a variety of conventional servitudes, as there are ways by which the exercise of property may be restrained by paction, in favour of another.

2. Conventional servitudes are constituted either by grant, where the will of the party burdened is expressed in writing, or by prescription, where his consent is presumed from his acquiescence in the burden for forty years. A servitude, constituted by writing or grant, is not effectual against the granter's singular successors, unless the grantee has been in the use or exercise of his right; which, in vulgar speech, is called possession, though improperly; for servitudes

servitudes are incorporeal rights, affecting the property of another, few of which are capable of proper possession: They are valid against the grantor and his heirs, even without use. In servitudes that may be acquired by prescription, forty years exercise of the right is sufficient, without any title in writing, other than a charter and seisin of the lands to which the servitude is claimed to be due*.

3. Servitudes constituted by grant are not effectual, in a question with the superior of the tenement burdened with the servitude, unless his consent be adhibited; for a superior cannot be hurt by his vassal's deed: But, where the servitude is acquired by prescription, the consent of the superior, whose right afforded him a good title to interrupt, is implied. A servitude by grant, tho' followed only by a partial possession, must be governed, as to its extent, by the tenor of the grant; but a servitude by prescription is limited by the measure or degree of the use had by him who prescribes, agreeably to the maxim, *Tantum praescriptum quantum possessum*.

Difference
between
the
two.

4. Servitudes are either predial (sometimes called real) or personal. Predial servitudes are burdens imposed upon one tenement in favour of another tenement. That to which the servitude is due is called the dominant, and that which owes it is called the servient tenement. No person can have right to a predial servitude, if he is not proprietor of some dominant tenement that may have benefit by it; for that right is annexed to a tenement, and so cannot pass from one person to another, unless some tenement goes along with it.

5.

* Vide *Kilk. Servitude*, No. 3.

Rural servitude, or of lands.

5. Predial servitudes are divided into rural servitudes, or of lands; and urban servitudes, or of houses. The rural servitudes of the Romans were *iter*, *actus*, *via*, *aquaeductus*, *aquahausus*, and *jus pascendi pecoris*. Similar servitudes may be constituted with us, of a foot-road, horse-road, cart-road, dams, and aqueducts, watering of cattle, and pasturage. The right of a highway is not a servitude constituted in favour of a particular tenement, but is a right common to all travellers. The care of highways, bridges, and ferries, is committed to the sheriffs, justices of peace, and commissioners of supply in each shire, 1669, c. 16.—1670, c. 9.—1686, c. 8.—5. Geo. I. c. 30.

Common pasturage;

what it comprehends.

6. Common pasturage, or the right of feeding one's cattle upon the property of another, is sometimes constituted by a general clause of pasturage in a charter or disposition, without mentioning the lands burdened; in which case, the right comprehends whatever had been formerly appropriated to the lands disposed, out of the granter's own property, and likewise all pasturage due to them out of other lands. When a right of pasturage is given to several neighbouring proprietors, on a moor or common belonging to the granter, indefinite as to the number of cattle to be pastured, the extent of their several rights is to be proportioned, according to the number that each of them can fodder in winter upon his own dominant tenement; which proportions may be fixed by an action of *fouming* and *rouming*, two old words, signifying the form of law by which the number of cattle that each proprietor may pasture upon the moor is ascertained.

7. The chief servitudes of houses among the Romans

Romans were those of support, viz. *tigni im-* Urban
mittendi, and *oneris ferendi*. The first was the servi-
 right of fixing in our neighbour's wall a joist tudes, or
 or beam from our house : The second was that houses.
 of resting the weight of one's house upon his
 neighbour's wall, *l. 33. de serv. praed. urb.* In
 this last, he who owed the servitude was bound,
 not only to suffer the house to rest on his wall,
 but to repair the wall when it became unfit for
 supporting that weight, *d. l. 33.* ; not from the
 nature of servitudes, which laid the servient te-
 nement under no obligation to do, but merely
 to suffer ; but in virtue of an express stipulation
 in the right, *l. 6. § 2. si serv. vind.* By our
 customs also, the owner of the servient tenement
 is not obliged, in a servitude of support, to re-
 pair it, unless the servitude be expressly so con-
 stituted, *St. 2. 7. 6.—Br. 117.*

8. Where different floors or stories of the same house belong to different persons, as is frequent in the city of Edinburgh, the property of the house cannot be said to be entirely divided ; the roof remains a common roof to the whole, and the area on which the house stands supports the whole ; so that there is a communication of property, in consequence of which, the proprietor of the ground-floor must, without the constitution of any servitude, uphold it for the support of the upper, and the owner of the highest story must uphold that as a cover to the lower. Where the highest floor is divided into garrets among the several proprietors, each proprietor is obliged, according to this rule, to uphold that part of the roof which covers his own garret, *St. 2. 7. 6.*

9. No proprietor can build, so as to throw the rain water falling from his own house immediately

immediately upon his neighbour's ground, without a special servitude which is called, of Stillicide. *stillicide*; but, if it falls within his own property, tho' at the smallest distance from the march, the owner of the inferior tenement must receive it. The Romans, to prevent the inconveniency of building too near a neighbour's property, obliged proprietors to keep within a certain distance of their own march, *l. 14. de serv. praed. urb.*: But we have no statute regulating this matter; tho', by the usage of several boroughs, proprietors are obliged to build some inches within the extremity of their property.

Servitude,
altius non
tollendi, et
non offici-
endi lumi-
nibus.

10. The servitudes, *altius non tollendi, et non officiendi luminibus vel prospectui*, restrain proprietors from raising their houses beyond a certain height, or from making any building whatsoever, that may hurt the light or prospect of the dominant tenement, *l. 4. 15. de serv. praed. urb.* These servitudes cannot be constituted by prescription alone; for, though a proprietor should have built his house ever so low, or should not have built at all upon his grounds, for forty years together, he is presumed to have done so for his own conveniency or profit; and, therefore, cannot be barred from afterwards building a house on his property, or raising it to what height he pleases, unless he be tied down by his own consent.

Servitude
of feal and
divot.

11. We have two predial servitudes to which the Romans were strangers, viz. that of feuel or feal and divot, and of thirlage; the first is a right, by which the owner of the dominant tenement may turn up peats, turfs, feals, or divots, from the ground of the servient, and carry them off either for feuel, or thatch, or the other uses of his own tenement. Common pasturage,

pasturage, tho' a greater servitude than that of feal and divot, does not necessarily comprehend the lesser under it; for the two servitudes are quite distinct, and the greater can be used without the lesser. The right, therefore, of casting feal will be excluded, if he who is entitled to the pasturage has never attempted to use the other right, or was interrupted in the attempt, Feal and divot not always comprehended under pasturage.

15. *Feb. 1668, L. Haining.*

12. Thirlage is that servitude by which lands are astricted, or thirled, to a particular mill, and the possessors bound to grind their grain there, for payment of certain multures and sequels, as the agreed price of grinding. In this servitude, the mill is the dominant tenement, and the lands astricted, (which are called also the thirle or sucken) the servient. Thirlage ; Multure is the quantity of grain or meal, payable to the proprietor of the mill, or to the multurer his tacksman. The sequels are the small quantities given to the servants, under the name of knaveship, bannock, and lock or gowpen. multure ; sequels. The quantities paid to the mill by the lands not astricted, are generally proportioned to the value of the labour, and are called out-town or out-sucken multures; but those paid by the thirle are ordinarily higher, and are called in-town or in-sucken multures.

13. Thirlage may be constituted by a landholder, when, in the disposition of certain lands, he astricts them to his own mill; or when, in the disposition of a mill, he astricts his own lands to the mill disposed: And sometimes he thirles his tenants to his own mill, by an act or regulation of his own court; which, however, cannot be binding on such tenants as do not oblige Thirlage, how constituted.

Disposition of a mill with multures.

oblige themselves to comply with it; for tenants cannot, but by their own consent, be subjected to any burden not mentioned in their tacks. The grant of a mill with the general clause of multures, without specifying the lands ascribed, conveys the thirlage of all the lands formerly ascribed to that mill, whether they were the property of the granter, or of a third party.

Thirlage to the mill of a barony.

14. A less formal constitution serves to ascribe barony-lands to the mill of the barony, than is necessary in any other thirlage; which perhaps proceeds from the effects of the union between the two. Hence, if a baron makes over the mill of a barony, *cum multuris*, or *cum ascriptis multuris*, it infers an ascription of the barony-lands to the mill conveyed, even of such as had been before sold to another for a certain duty *pro omni alio onere*, 17. July 1620, L. Newliston.

A right of lands *cum multuris*, implies their freedom from thirlage.

But if, prior to the baron's conveyance of his mill *cum multuris*, he had sold any part of the barony-lands to another *cum multuris*, the first purchaser's lands are not ascribed by the posterior grant; for a right of lands with the multures implies a freedom of these lands from thirlage; and no person has power, after he is divested of lands, to subject them to any servitude from which they were before exempted, *Harc. 721. 722.*

Thirlage of grindable corns.

15. Thirlage is either, 1. of grindable corns; or, 2. Of all growing corns; or, 3. Of the *invecta et illata*, i. e. of all the grain brought within the thirle, though of another growth. Where the thirlage is of grindable grain, it is in practice restricted to the corns which the tenants have occasion to grind, either for the support

support of their families, or for other uses ; the surplus may be carried out of the thirle unmanufactured, without being liable in multure, Feb. 1731, Lockhart.—17 Feb. 1736, Lockhart.

Where it is of the *grana crescentia*, the whole grain growing upon the grain is astricted, with the exceptions, 1. Of seed and horse-corn, which are destined to uses inconsistent with grinding ; and, 2. Of the farm duties due to the landlord, if they are deliverable in grain not grinded ; for it is not to be presumed that the landlord, who must sell his farms, meant to extend the servitude against himself : But, if the rent be payable in meal, flour, or malt, the grain of which these are made must be manufactured in the dominant mill.

Thirlage
of *grana
crescentia*.

16. The thirlage of *invecta et illata* is seldom constituted, but against the inhabitants of a borough or village, that they shall grind all the corns they import thither at the dominant mill. Where this thirlage is imposed, the words generally are, *all corns brought within the thirle that thole (or suffer) fire and water therein*. Lord Stair, 2. 7. 20. Craig, 253, § 6. and Mackenzie, h. t. § 26. interpret these words, of such tholing of fire and water as prepares the grain for the mill, that is, steeping the grain, and drying it in kilns ; but not of brewing or baking, which is not done till after the grain is actually manufactured ; which opinion is supported by practice, 22^d Feb. 1707, Heriot's Hospital : And, upon this principal, multure cannot be exacted, in a thirlage of *invecta et illata*, for flour or oat-meal brought into the servant tenement, unless the importer had bought it in grain, and grinded it at another mill, Falc.

Thirlage
of *invecta
et illata* ;

of how inter-
preted.

Grain
thus thir-
led may
pay
double
multure.

vol. 2. 61. The same grain that owes multure, as *granum crescens*, to the mill in whose thirle it grew, if it shall be afterwards brought within a borough where the *invecta et illata* are thirled, must pay a second multure to the proprietor of that dominant tenement; but, where the right of these two thirlages is in the same proprietor, he cannot exact both, *K. 30.* Where lands are thirled in general terms, without expressing the particular nature of the servitude, the lightest thirlage is presumed, from the favour of liberty; but, in the attriction of a borough or village, where there is no growing grain which can be the subject of thirlage, the attriction of *invecta et illata* must be necessarily understood, *Fauc. vol. 1. 133.*

Thirlage
by pre-
scription;

7. Thirlage, in the general case, cannot be established by prescription alone, for *iis quae sunt merae facultatis non praescribitur*; but, where one has paid, for forty years together, the heavy multures, the slightest title in writing will subject his lands, *e. g.* a decree against him, in which he was not regularly called. Thirlage may be, contrary to the common rule, constituted by prescription alone, 1. Where one pays to a mill a certain sum, or quantity of grain yearly, in name of multure, whether he grinds at it or not

in the case
of dry
multure;
in mills of
the King's
property;

(which is called dry multure); for such payment cannot bear a construction consistent with the freedom of his lands. 2. In mills of the King's property; because the King's original right to all heritable subjects is constituted *jure coronae*, without titles in writing; and, where he derives right from another, his titles are more liable to be lost. This is extended in practice to mills belonging to church-lands, in consequence of *Act*

in mills of
church
lands.

S. 16. Dec. 1612 (see *Spotf. Pr. 190.*), whereby thirty

thirty years possession of church-lands by churchmen, computed backwards from the time of commencing the action against them, is deemed equivalent to a title in writing, from a presumption that their rights were destroyed at the reformation, 22. Jan. 1740, Lord *Maxwell*. Tho' thirlage itself cannot be constituted by mere possession, the proportion of multure payable to the dominant tenement may be so fixed.

18. The possessors of the lands astricted are Mill servants bound to uphold the mill, repair the dam-dykes vices, and aqueducts, and bring home the mill-stones. These services, though not expressed in the constitution, are implied in thirlage; and even in thirlage not expressly constituted by writing, if the thirle has been in use to perform certain services, such partial use infers an obligation to perform all those that are usually demanded in that servitude, 16. Dec. 1732, *Crawford*: But, where there is neither an explicit constitution of thirlage, nor proof of services of any sort performed by the suckeners, the dominant tenement can claim none, Dec. 1744, *L. Inches*; for, in such case, the rule holds, *tantum prae-scriptum, quantum possessum* *.

19. The proprietor of a mill can sue the tenants or possessors within the thirle, who have carried their grain to another mill, in an action of abstracted multures, which may be brought before the judge-ordinary. This action, if the proprietor of the lands be not cited, cannot have the effect to interrupt him from prescribing an immunity from the thirlage; but such

* Vide *Kames's Rem. Dec.* No. 12.

such prescription may be effectually interrupted by an action of declarator of thirlage against the proprietor, to which the Court of Session alone is competent.

Servitudes are *stricti juris*.

20. Servitudes, being restraints upon property, are *stricti juris*: They are not therefore presumed, if the acts upon which they are claimed can be explained consistently with freedom; and, when servitudes are constituted, they ought to be used in the way least burdensome to the servient tenement. Hence, when one has a right of pasturage, or of seal and divot, upon a neighbouring muir or heath, though he has it, strictly speaking, upon the whole tenement, according to the rule in servitudes, *unaquæque gleba servit*; yet the proprietor of the muir will be allowed to till part of it, if he leaves untilld what is enough for the purpose of the servitude, 20. Jan. 1680, *E. Southesk*,—*Dirl.* 86.; hence also, one who has a servitude of peats upon his neighbour's moss, is not at liberty to extend it for the use of any manufacture which may require an extraordinary expence of feuel, but must confine it to the natural uses of the dominant tenement.

Extinction of servitudes;

confusione;

interitu rei;

21. Servitudes are extinguished, 1. *Confusione*, when the same person comes to be proprietor of the dominant and servient tenements; for *res sua nemini servit*, and the use of the proprietor thereafter makes of the servient tenement, is not *jure servitutis*, but is an act of property. Nor is the attriction of tenants to the landlord's mill, an exception from this rule; for in thirlage, it is not the lands themselves that are attricted, but the fruits, which belong to the tenant. 2. By the perishing either of

of the dominant or servient tenement : But, if a mill shall be only disabled for a time from service, the thirle can, during such temporary insufficiency, carry no more of their grain to other mills than what they have immediate use for, *Jan. 1736, E. Wigton*. By the former practice, they were, in such case, subjected to the multures, as if the mill could have served them ; and were only exempted from the sequels, *F. 28. Feb. 1684, Macdougall*. 3. Servitudes are lost *non utendo*, by the dominant tenements neglecting to use the right for forty years ; which is considered as a dereliction of it, though he who has the servient tenement should have made no interruption, by doing acts contrary to the servitude.

22. Thirlage may be extinguished by a charter of the astricted lands granted by the owner of the dominant tenement, *cum multuris* ; which does not barely presume, that the lands in the grant were before free, but implies an exemption, though they had been formerly burdened with thirlage, *F. 26. Jan. 1705, Graeme* : Nor is it necessary that such clause be inserted in the dispositive part of the charter, because exemption from servitude is only a quality annexed to lands, and not a separate subject, *Dirl. 1.* ; but, where the vassal has continued to pay insucken multures after such charter, freedom from thirlage is not inferred, *St. 2. 7. 24*. In rights flowing from the crown, except in the clause of multures, when it is only in the *tenendas*, has no effect ; because, when signaturs are presented in Exchequer, the greatest part of the *tenendas* is left blank, which is afterwards filled up at the discretion of the chancery.

chancery-clerk, or the framer of the signature,
8. Jan. 1662, Stewart.

Personal
servitudes.

23. Personal servitudes are those by which the property of a subject is burdened, in favour, not of a tenement, but of a person. The only personal servitude known in our law, is usufruct or liferent, which is a right to use and enjoy a thing during life, the substance of it being preserved. A liferent cannot therefore be constituted upon things which perish in the use; and, though it may, upon subjects which gradually wear out by time, as household-furniture, &c. yet, with us, it is generally applied to heritable subjects. He, whose property is burdened, is usually called the *fiar*.

Liferent;

conven-
tional life-
rent;

simple
liferent.

must be
constitu-
ted by
seisin.

Proper
right of
liferent
intrans-
missible.

24. Liferents are divided into conventional and legal; conventional liferents are either simple, or by reservation. A simple liferent, or by a separate constitution, is that which is granted by the proprietor in favour of another: And this sort, contrary to the nature of predial servitudes, requires seisin in order to affect singular successors; for a liferent of lands is, in strict speech, not a servitude, but a right resembling property, which constitutes the liferenter vassal for life; and singular successors have no way of discovering a liferent-right, which perhaps is not yet commenced, but by the records; whereas, in predial servitudes, the constant use of the dominant tenement makes them public. The proper right of liferent is intransmissible, *offibus usufructuarii inhaeret*: When the profits of the liferented subject are transmitted to another, the right becomes merely personal, for it entitles the assignee to the rent, not during his own life, but his cedent's,

cedent's, and is therefore carried by simple assignation, without seisin.

25. A *liferent* by reservation is that, which a proprietor reserves to himself, in the same writing, by which he conveys the fee to another. It requires no seisin; for the granter's former seisin, which virtually included the *liferent*, still subsists as to the *liferent* which is expressly reserved. A *liferenter* by reservation, may enter the heirs or singular successors of vassals, as if he were *fiar*, *Cr.* 416. § 5. and is entitled to the casualties of superiority that fall during his life; his right being more amply interpreted than that of a simple *liferenter* who had no prior interest in the lands. In conjunct infeftments taken to husband and wife, the wife's right of conjunct fee resolves, in the general case, into a *liferent*, which is however as extensive as a *liferent* by reservation.

26. *Liferents* by law, are the *terce* and the *liferents* courtesy. The *terce* (*tertia*) is a *liferent* competent by law to widows, who have not accepted of special provisions, in the third of the heritable subjects, in which their husbands died infeft. By our ancient customs, the widow was entitled only to a third of the lands in which the husband stood infeft at the marriage; so that she had no claim upon what he had acquired during the marriage, perhaps by her own industry or oeconomy, *R. m. l. 2. c. 16. § 5. 9.* The *terce* takes place only where the marriage has subsisted for year and day, or where a child has been born alive of it. No *terce* is due out of lands in which the husband was not infeft, 29. *Jan. 1706, Carruthers*, unless in the case of fraudulent omission; for which see *Cr.* 423. § 27.—*St. 2. 6. 16.*

27. The

out of
what sub-
jects it is
due;

its prefer-
ence.

Lesser
terce.

27. The terce is not limited to lands, but extends to teinds, and to servitudes and other burdens affecting lands; thus, the widow is entitled, in the right of her terce, to a liferent of the third of the sums secured, either by rights of annualrent, or by rights in security. In improper wadsets, the terce is a third of the sum lent: In those that are proper, it is a third of the wadset-lands; or, in case of redemption, a third of the redemption-money. If the husband had two dwelling-houses, the widow has right to the second; if he had but one, the heir must, in the opinion of Craig, allow her the third of it, 424. § 29. By the later practice, he is entitled to the sole possession of it, but cannot let it to another, 26. *Jan. 1665, Logan*. Neither rights of reversion, superiority, nor patronage, fall under the terce; for none of these have fixed profits, and so are not proper subjects for the widow's subsistence; nor tacks, because they are not feudal rights. Burgage tenements are also excluded from it, *Cr. 425. § 34.* the reason of which is not so obvious. Since the husband's seisin is both the measure and security of the terce, such debts or diligences alone, as exclude the husband's seisin, can prevail over it: A disposition of lands, therefore, or an heritable bond granted by the husband, or an adjudication led against his estate, if not followed by seisin, cannot affect the terce*.

28. Where a terce is due out of lands, burdened with a prior terce still subsisting, the second tercer has only a right to a third of the two thirds that remain unaffected by the first terce; *R. M. l. 2. c. 16. § 64.* But upon the death of the first widow, whereby the lands are disburdened of her terce, the lesser terce becomes enlarged,

* Vid. *Dirleton's Doubts, voce Terce, § 1.*

enlarged, as if the first had never existed. Formerly, the widow was, contrary to the common Terce rules, entitled to a terce, even though the husband had made a special provision in her favour, ^{now excluded by} unless it had been expressly granted in satisfaction of the terce; but, by 1681, c. 10, the widow, who has accepted of a special provision from her husband, is thereby excluded from the terce, unless such provision shall contain a clause, that she shall have right to both. ^{a special provision.}

29. The widow has no title of possession, Brief of and so cannot receive the rents in virtue of her terce: terce, till she be served to it; and, in order to this, she must obtain a brief out of the chancery, directed to the sheriff, who calls an inquest, to take proof that she was wife to the deceased; and that the deceased died intestate in the subjects contained in the brief. The service of vice or sentence of the jury, finding these widows. points proved, does, without the necessity of a Kenning retour to the chancery, entitle the wife to enter of widow, or into the possession, St. 2. 6. 13.; but she cannot the division of the only possess with the heir *pro indiviso*, and so lands. cannot remove tenants, till the sheriff kens her lands to her terce, or divides the lands between her and the heir. In this division, after determining by lot or *kavil*, whether to begin by the sun or the shade, *i. e.* by the east or the west, the sheriff sets off the two first acres for the heir, and the third for the widow. Sometimes the division is executed by giving one entire farm to the widow, and two of equal value to the heir. The widow's right is not properly The right constituted by this service, it was constituted of terce is before, by the husband's *feisin*, and fixed by constituted his death; the service only declares it, and service. so entitles her to the third part of the rents

retro to her husband's death, preferable to any rights that may have affected the lands in the intermediate period between that and her own service. The relict, if she was reputed to be lawful wife to the deceased, must be served, notwithstanding any objections by the heir against the marriage, which may be afterwards tried by the commissary, 1503, c. 77.

Courtesy, 30. Courtesy is a liferent given by law, to the surviving husband, of all his wife's heritage in which she died intestate, if there was a child of the marriage born alive. A marriage, tho' of the longest continuance, gives no right to the courtesy, if there was no issue of it. The child born of the marriage must be the mother's heir: If she had a child of a former marriage, who is to succeed to her estate, the husband has no right to the courtesy while such child is alive, *F. 1. Dec. 1702, Darleith*, contrary to Sir *Tho. Craig's* opinion, 428. § 43.; so that the courtesy is due to the husband, rather as father to an heir, than as husband to an heirs; conformable to the Roman law, which gives to the father the usufruct of what the child succeeds to by the mother, *l. 1. C. de bon. mat.* Heritage is here opposed to conquest, 3. 8. 6. and so is to be understood only of the heritable rights, to which the wife succeeded as heir to her ancestors, excluding what she herself had acquired by singular titles.

how burdened; 31. Because the husband enjoys the liferent of his wife's whole heritage, on a lucrative title, he is considered as her temporary representative, and so is liable in payment of all the yearly burdens chargeable on the subject, and of the current interest of all her debts, real and personal,

personal, to the value of the yearly rent he enjoys by the courtesy, *K. 2.* The courtesy needs no solemnity to its constitution: That right which the husband had to the rents of his wife's estate, during the marriage, *jure mariti*, is continued with him after her death, under the name of courtesy, by an act of the law itself. As in the terce, the husband's seisin is the ground and measure of the wife's right, so in the courtesy, the wife's seisin is the foundation of the husband's; and the two rights are, in all other respects, of the same nature; if it is not, that the courtesy extends to burgage holdings, *L. B. c. 44* and to superiorities, *arg. 1681, c. 21.*

it is constituted without any service.

Wife must be infeft.

32. All liferenters must use their right, *salva rei substantia*: Whatever, therefore, is part of the fee itself, cannot be encroached on by the liferenter, *e. g.* woods or growing timber, even for the necessary uses of the liferented tenement, *F. 3. July 1696, Lady Borthwick.* But, where a coppice or *silva caedua* has been divided into hags, one of which was in use to be cut annually by the proprietor, the liferenter may continue the former yearly cuttings; because these are considered as the annual fruits the subject was intended to yield, and so the proper subject of a liferent. Liferenters have no right to coals or minerals under ground, if they be not expressed in the right; for they are proper *partes soli*, 13. *July, 1677, Lady Preston.*—*June 1727, heirs of Roseburn.* Where they are expressed, the liferenter may, by the former rule, work any colliery that had been opened before the commencement of his right, provided he does not employ a greater number

Right of liferent how limited;

as to growing timber;

as to minerals.

number of colliers, or bring up a greater quantity of coals than the proprietor did.

Burdens
affecting
it.

Cautio usufructuaria.

Alimony
of the
heir.

33. Our law, to preserve the liferented subjects for the fiar, directed liferenters to give security, (called in the Roman law *cautio usufructuaria*), that they should keep them in good condition during the liferent, 1491, c. 25. under the penalty of losing the profits thereof, 1535, c. 15. A special method is chalked out in the case of tenements within borough, by act 1594, c. 226. Liferenters are also burdened with the alimony of the heir, where he has not enough for maintaining himself; which is founded in an extension of the last clause of act 1491, c. 25. by the first part whereof, not only ward superiors, but liferenters, were obliged to preserve, in good condition, the subject of the ward or liferent*. The name of an employment, if it does not afford bread to the heir, will not defend the liferenter against this burden, 25. July 1705, *Ayton*. The bare right of apparency founds the action against the liferenter, 12. Feb. 1035, *Hepburn*. It is a burden personal to the liferenter himself, and cannot be thrown upon his adjudging creditors, as coming in his place by their diligences, 1737, *Cred. of Blair*. Liferenters are also subjected to the payment of the yearly cesses, stipends, &c. falling due during their right, and to all other burdens that attend the subject liferented.

The ex-
piry of
liferents;

of lands,

34. Liferent is extinguished by the liferenter's death. That part of the rents which the liferenter had a proper right to, before his death, falls to his executors; the rest, as never having been *in bonis* of the deceased, goes to the fiar.

Martinmas

* But liferenters of money are not subjected to this burden.

Martinmas and Whitsunday are, by our custom, the legal terms of the payment of rent : Con- regulated frequently, if a liferenter of lands survives the ^{by the le-} term of Whitsunday, his executors are entitled ^{gal terms.} to the half of that year's rent, because it was due the term before his death ; if he survives Martinmas, they have a right to the whole. And this is the rule, tho' the conventional term should be after Martinmas ; for still the rent, tho' not payable, was due while the liferenter was yet alive ; and the postponing the term of payment cannot hurt the right of the executors, *Gosford*, 24. July 1668, *Carnegy*. A liferenter, who outlives any part of the term-day, transmits to his executors the right to that term, *F. 8. Dec. 1704, Paterson*. If the life- What if renter, being in the natural possession, and ha- the life- ving first sowed the ground, should die, even ^{renter} before the Whitsunday, his executors are en- ^{sowed the} titled to the whole crop, in respect that both ^{ground.} seed and industry were his, 25. July 1671, *Guthrie*. Liferents of mills, though their fruits Liferents are continual, *de die in diem*, are governed by ^{of mills ;} the same rule with liferents of lands, 8. Dec. 1617, *Guthrie*. In a liferent of money constitu- ^{of money.} ted by a moveable bond, the executors have a right to the interest, down to the very day of the liferenter's death, where no terms are mentioned for the payment thereof ; but, in the case of an heritable bond, or of a money-liferent secured on land, the interests of liferenter and fiar (or of heir and executor ; for the same rules serve to fix the interests of both) are governed by the legal terms of land-rent, 11. Jan. 1738, *Carruthers*, without regard to the conventional, 12. Jan. 1681, *Trotter*.

TIT. 10. *Of Teinds.*

Benefices
consist of

church-
lands,

and
teinds.

F Ecclesiastical rights are called benefices, an appellation transferred from secular feus to church livings, because they were given to churchmen, in consideration of their spiritual warfare. They consist either of lands, or of the tithe or teind of lands; the first is called the temporality, the other the spirituality of the benefice. That church lands might not be aliened by the beneficiaries, in prejudice of their successors, Bishops, and the heads of religious houses, were disabled from making grants, without the consent of the chapter or convent; which rule continued after the reformation, during church-government by Bishops, 1606, *c.* 3. The King's confirmation, as the presumed patron, was also to be adhibited to grants of church lands, *R. M. l. 2. c.* 23.; which right, tho' wrested from our sovereigns by the Pope, *Cr.* 146. § 29. was, upon the reformation, restored to the crown, 1584, *c.* 7. &c.

2. Teinds, or tithes, are that liquid proportion of our rents, or goods, which is due to churchmen for performing divine service, or exercising the other spiritual functions proper to their several offices. Most of the canonists affirm, that the precise proportion of a tenth, not only of the fruits of the ground, but of what is acquired by personal industry, is due to the christian clergy, of divine right, which they therefore call the proper patrimony of the church; tho' it is certain that tithes, in their infancy, were given, not to the clergy alone, but to lay-monks, who were called *pauperes*, and to other indigent persons. Charles the Great was the first secular Prince who acknow-

ledged

ledged this right in the church. It appears to have been received with us as far back as David I. by two charters of that King, preserved in *Anderson's Diplomata*. Our first statute concerning teinds, is *Dav. II. c. 42*.

3. This right, if it had been divine, ought naturally to have belonged to the pastor of the parochial church; but its application was for a long time miserably inverted: For not only did those who were liable in payment, at first consider their obligation as fulfilled, by giving the right of their tithes to any poor lay friend; but, even after tithes had been, by the church canons, consecrated to the parochial churches, the patron, who in those ages looked on himself, upon the emerging of every vacancy, as the absolute proprietor of the benefice, assumed frequently a power of appropriating or annexing it to a cathedral church or monastery; by which annexation, the cathedral or monastery became the beneficiary or titular of the benefice annexed. At other times, churchmen, who had not their tithes regularly paid them, made a grant of part of them to the Sovereign, that they might the better engage his interest for making the rest effectual: And, lastly, most of the religious orders procured from the Pope an exemption from payment of the tithe of lands possessed by themselves, which ought to have been paid to the several churches where the lands lay. These abuses were in some measure corrected, first, by a Papal constitution of Adrian IV. *anno 1156*, limiting such exemptions to the three orders of Cisterrians, Hospitalers, and Templars; and afterwards by several councils of Lateran, one held by Alexander III. in 1180, one by Innocent III. in 1215, &c. prohibiting the farther infeudation of tithes to laymen,

Teinds which ought to have been paid to the parson,

were frequently appropriated to cathedrals and monasteries.

Certain orders exempted from paying them.

These abuses corrected by canons.

men, and their further consecration to any other than the parish-church.

Vicar ;

at first named during pleasure ;

afterwards perpetual.

Mensal and common churches.

Teinds are either parsonage or vicarage.

4. The person employed by the cathedral church or monastery, to serve the cure in the church annexed, was called a vicar, because he held the church, not in his own right, but in the right or *vice* of his employers; and so was removeable at pleasure, and had no share of the benefice other than what they thought fit to allow him : But, in the course of time, the appellation of vicar was limited to those who were made perpetual, and who got a stated share of the benefice for their incumbency ; from whence arose the distinction of benefices into parsonages and vicarages. The Bishops, according to *torbes* on Tithes, p. 35. 36. about the thirteenth century, divided with their chapters the churches that had been annexed to their cathedrals : Those which fell to the bishop himself were styled mensal, because they supported the expence of his table ; those that went to the chapter were called common, as belonging in common to all its members ; but it is more probable that this distinction owed its rise, long before the thirteenth century, to the appropriation of parochial churches to cathedrals ; some of which the patron gave to the bishop himself, which were called mensal ; and others to the bishop and his chapter, which got the name of common.

5. Personal teinds, *i. e.* the tenth of what one acquires by his own industry or employment, are not acknowledged by our law ; tho' they have been found due when supported by forty years possession, 29. Nov. 1678, *Berny*. Predial teinds are, by the usage of Scotland, either parsonage or vicarage. Parsonage teinds are the teinds of corn ; and they are so called because

because they are due to the parson, or other titular of the benefice. Vicarage teinds are the small teinds of calves, lint, hemp, eggs, &c. which are commonly given by the titular to the vicar who served the cure in his place. The first sort was universally due, unless in the case of their infeudation to laics, or of a pontifical exemption; but, by the customs of almost all Christendom, the lesser teinds were not demanded, where they had not been in use to be paid. By the practice of Scotland, the teinds of animals, or of things produced from animals, as lambs, wool, calves, are due, tho' not accustomed to be paid, *F. 24. July 1678, L. Grant**; but roots, herbs, &c. are not tithable, unless use of payment be proved, *g. June 1676, Burnet.*

6. The parson, who was entitled to the teind of corns, made his right effectual, either by accepting of a certain number of teind-bolls yearly from the proprietor in satisfaction of it; or more frequently, by drawing or separating upon the field his own tenth part of the corns, after they were reaped, from the stock or the remaining nine-tenths of the crop, and carrying it off to his own granaries, which is called drawn-teind. And, if any possessor of lands carried his part of the corns off the ground before the churchman had drawn the teind, he was liable in a tpuilzie; which frequently occasioned the loss of the whole crop, in the case, either of an ill natured or of an indolent titular. This hardship was softened, rather than removed, by the acts 1606, c. 8.—1612, c. 5.—1617, c. 9. regulating the times within which the titular must either draw his teind, or leave the possessor of the lands at liberty to carry off his stock.

G g

7.

* Vide Stair, b. 2. t. 8. § 6.

Church-lands fell to the crown upon the Reformation.

Erection of benefices into temporal lordships.

Annexation of church-lands to the crown.

7. After the Reformation, James VI. considered himself as proprietor of all the church-lands; partly because the purposes for which they had been granted were declared superstitious; and partly in consequence of the resignations which he and Q. Mary his mother had procured from the beneficiaries: And, even as to the teinds, though our reformed clergy, after the example of the canonists, claimed them as the patrimony of the church, our sovereign did not submit to that doctrine, farther than it extended to a competent provision for ministers. He therefore erected or secularised several abbeys and priories into temporal lordships; the grantees of which were called sometimes lords of erection, and sometimes titulars, as having by their grants the same title to the erected benefices that the monasteries had formerly.

8. As the crown's revenue suffered greatly by these erections, the temporality of all church-benefices (*i. e.* church-lands) was, by 1587, c. 29. annexed to the crown. That statute, tho' it does not comprehend teinds, excepts from the annexation the teinds of lands belonging to parsonages and vicarages, together with their manſes and glebes; and declares, that all these shall remain with the present possessors, or with those that shall be afterwards provided to the benefices. Lands granted to universities, schools, and hospitals, are also excepted, (tho' these did not truly fall within the act, not being church-lands); and benefices of laic patronages, by which is meant such as were established before the Reformation in laymen, whose rights the legislature had no intention to weaken. Notwithstanding this statute, his Majesty con-

tinued

tinued to make farther erections, which were declared null by 1592, *c.* 119. with an exception of such as had been made in favour of lords of parliament, since the general act of annexation in 1587.

9. K. Charles I. soon after his succession, raised a reduction of all these erections, whether granted before or after the act of annexation, upon the grounds mentioned at length by Mr Forbes, in his treatise of tithes, *p.* 259. In a conference between the King and the titulars, upon the subject of this suit, his Majesty insisted, 1. That all proprietors should be relieved from the hardship of having their teinds drawn by the titulars. 2. That all the superiorities of erections (*i. e.* of lands holden of the titulars, as coming in place of the monasteries) should be declared to be in the crown, on a reasonable composition to be paid to the titulars for passing from their right. 3. That a small interest should be reserved to the crown out of all the erected teinds. At last, the whole matter was referred to the King himself, by four several submissions or compromises, in which the parties on one side were the titulars and their tacksmen, the bishops with the inferior clergy, and the royal boroughs, for the interest they had in the teinds that were gifted for the provision of ministers, schools, or hospitals within their boroughs; and, on the other part, the proprietors, who wanted to have the leading of their own teinds. The submission by the titulars contained a surrender, into his Majesty's hands, of the superiorities of their several erections.

K. Cha. I.
raises re-
duction of
the erec-
tions.

His Maje-
sty's de-
mands.

All diffe-
rences re-
ferred to
the King
himself.

10. Upon each of these submissions, his Majesty pronounced separate decrees arbitral, His de-
dated bitral.

Proprietors may sue for a valuation and sale of tithes.

Teinds valued either jointly,

or separately.

Privilege of a proprietor suing for a valuation.

dated 2. Sept. 1629, which are subjoined to the acts of parliament of his reign. He made it lawful to proprietors to sue the titulars for a valuation; and, if they thought fit, for a sale also of their teinds, before the commissioners named or to be named for that purpose. The rate of teind, when it was possessed by the proprietor jointly with the stock, for payment of a certain duty to the titular, and so did not admit a separate valuation, was fixed at a fifth part of the constant yearly rent, which was accounted a reasonable *surrogatum*, in place of a tenth of the increase, *New Coll. vol. 2. 18.* Where it was drawn by the titular, and consequently might be valued separately from the stock, it was to be valued, as its extent should be ascertained, upon a proof before the commissioners; but, in this last valuation, the King directed the fifth part to be deducted from the proved teind, in favour of the proprietor, which was therefore called the King's ease, 28. Jan. 1708, *Doul.—7. Feb. 1711, Home.* The proprietor suing for a valuation, gets the leading of his own teinds as soon as his suit commences; but, if he shall suffer protestation to be extracted against him, for not insisting in the process, he loses that privilege, by 1693, c. 23. The proprietor is, in all valuations, allowed a joint proof with the titular, by our present law 1690, c. 30.; and, upon getting his decree of valuation, he may be compelled by the titular, if he shall insist for it, to infect him in the lands, for his security of the valued teind, *Mackenzie, b. 1. § 16.*

11. Where the proprietor insisted also for a sale of his teinds, the titular was obliged to sell them at nine years purchase of the valued teind-duty;

duty ; and, upon receiving the price, to execute a disposition in the purchaser's favour, containing procuratory of resignation and precept of feisin, which the decreet-arbitral directs the granter to warrant only from his own fact and deed ; but, by 1633, *c.* 19. the extent of the warrandice is left to the discretion of the commissioners. If the pursuer had a tack of his own teinds not yet expired, or if the defender was only tacksmen of the teinds, and so could not give the pursuer an heritable right, an abatement of the price was to be granted accordingly by the commissioners. This part of the decreet-arbitral, concerning the valuation and sale of teinds, was ratified in parliament, 1633, *c.* 17. and commissioners were appointed for executing it by the same parliament, *c.* 19.

12. There is no provision in the decrees arbitral for selling the teinds granted for the sustentation of ministers, universities, schools, or hospitals ; because these were to continue, as a perpetual fund, for the maintenance of the persons or societies to whom they were appropriated ; and they are expressly declared not subject to sale, by 1690, *c.* 30.—1693, *c.* 23. By the last of these acts, it is also provided, that the teinds belonging to bishops, which had then fallen to the crown, upon the abolishing of Episcopacy, should not be subject to sale as long as they remained with the crown not disposed of ; nor those which the proprietor, who had right both to stock and teind, reserved to himself, in a sale or feu of lands. But, tho' none of these teinds can be sold, they may be valued.

Certain
teinds
cannot be
sold.

13. The King, by the decrees arbitral, declared his own right to the superiorities of erection belong to the King.

rection

unless the church-vassal chuses to hold his lands of the titular. rection which had been resigned to him by the submission, reserving to the titulars the feu-duties thereof, until payment by himself to them, of one thousand merks Scots for every chalder of feu-victual, and for each hundred merks of feu-duty, ratified 1633, *c.* 14.; which right of redeeming the feu-duties was renounced by the crown, 1707, *c.* 11. If the church-vassal should consent to hold his lands of the titular, he cannot thereafter recur to the crown, as his immediate superior, 1661, *c.* 53.

Annuity of teinds.

14. His Majesty referred what interest the crown ought to have, in the teinds of erected benefices to the commissioners; who determined an annuity to be paid out of them to the crown, of about six *per cent.* ratified 1633, *c.* 15. This right, not having been annexed, was conveyed to one Livingston in security of a debt; but, in 1674, the exercise of it was suspended by the crown; since which time, it has lain dormant, *St.* 2. 8. 13.

Rules for fixing the rent in the valuation of teinds;

Rent of quarries, &c. not teindable,

nor of orchards,

15. In explaining what the constant rent is, by which the teind must be valued, the following rules are observed. The rent drawn by the proprietor, from the sale of subjects, that are more properly parts of the land than of the fruits, *e. g.* quarries, minerals, mosses, &c. is to be deducted from the rental of the lands, 11. *Dec.* 1734, heritors of *Cadder*; and also the rent of supernumerary houses, over and above what is necessary for agriculture; and the additional rent that may be paid by the tenant, in consideration of the proprietor's undertaking any burden that law imposes on the tenant, *e. g.* upholding the tenant's houses, *ibid.*; because none of these articles are paid properly on account of the fruits. Orchards must also be

be deducted, *New Coll. vol. 2. 18.*; and mill-rent, because the profits of a mill arise from industry; and the corns manufactured there suffer a valuation, as rent payable by the tenant; and therefore ought not to be valued a second time against the titular, as mill rent. The yearly expence of culture ought not to be deducted; for no rent can be produced without it, 6. Feb. 1745, feuers of *Dalkeith*: But if an improvement of rent is made at an uncommon expence, *e. g.* by draining a lake, the proprietor is allowed a reasonable abatement on that account, 18. July 1739, herit. of *Cadder*.

nor mill-rent,

nor rent improved at an extraordinary expence.

16. Notwithstanding the several ways of misapplying parochial teinds in the times of Popery, some few benefices remain entire in the hands of the parsons. The ministers planted in these, after the reformation, continued to have the full right to them, as proper beneficiaries; but, by acts 1690, c. 23. and 1693, c. 25. a power is granted to the patron to redeem the whole teind from such beneficiaries, upon their getting a competent stipend modified to them; which teind so redeemed, the patron is obliged to sell to the proprietor at six years purchase.

Teinds not disposed of,

now redeemable by the patron, from the beneficiary.

17. Some teinds are more directly subject to an allocation for the minister's stipend, than others. The teinds in the hands of the lay titular fall first to be allocated, who, since he is not capable to serve the cure in his own person, ought to provide one who can; and if the titular, in place of drawing the teind, has set it in tack, the tack-duty is allocated: This sort is called free teind. Where the tack-duty, which is the titular's interest in the teinds,

In what order teinds are subject to allocation for stipend.

falls

falls short, the tack itself is burdened, or, in other words, the surplus teind over and above the tack-duty : But, in this case, the commissioners are empowered to recompense the tacksmen, by prorogating his tack for such a number of years as they shall judge equitable, 1690, c. 30.—1707, c. 9. Where this likewise proves deficient, the allocation falls on the teinds heritably conveyed by the titular, unless he has warranted his grant against future augmentations ; in which case, the teinds of the lands belonging in property to the titular himself must be allocated in the first place.

Titular
may allo-
cate any
of the
teinds, if
there is no
locality ;

but not
after cita-
tion in a-
ny sale of
teinds.

Ministers
glebes,
and lands
*cum deci-
mis inclusis*,
are ex-
empted
from
teind.

18. Where there is sufficiency of free teinds in a parish, the titular may allocate any of them he shall think fit for the minister's stipend, since they are all his own ; unless there has been a previous decree of locality : And this holds tho' the stipend should have been paid immemorially out of the teinds of certain particular lands. This right was frequently abused by titulars, who, as soon as a proprietor had brought an action of sale of his teinds, allocated the pursuer's full tiend for the stipend, whereby such action became ineffectual : It is therefore provided, by 1693, c. 23. that, after citation in a sale of teinds, it shall not be in the titular's power to allocate the pursuer's teinds solely, but only in proportion with the other teinds in the parish.

19. Minister's glebes are declared free from the payment of teinds, 1578, c. 62.—1621, c. 10. Lands *cum decimis inclusis* are also exempted from teind. These were, according to *Mackenzie, b. t. § 6.* the lands which had been feued out, prior to the above recited Lateran councils, (which prohibited the infeudation of

teinds

teinds to laics), by churchmen who had right both to stock and teind; whereby the teinds were consolidated with the stock, and were never afterwards separated from it. Sir Tho. Craig, who is of opinion that we had no infeudation of teinds so early, understands, by that expression, all lands, where the churchmen, who had right both to stock and teind, and came afterwards to feu out the lands (which they were allowed to do, by 1457, c. 71.) included the teind in the same charter with the stock; without distinguishing whether such right was prior or posterior to the Lateran councils: And, agreeably to this last opinion, it has been adjudged sufficient to exempt lands from payment of teind, that the proprietor proved his right thereto, *cum decimis inclusis*, as far back as the act 1587, c. 29. which supposes all such rights to be valid, *Dirl. 229.—7. Dec. 1737, Dempster*. Lands which formerly belonged to the Cistercians, or other privileged orders, are not now exempted from teind, 15. *June 1737, minister of Barry*; either because the privilege having been given to the monks, as *pauperes*, was deemed personal, and so not transmissible to the laic titulars; or because it was limited to lands which these orders were then possessed of; and it does not appear that they had property in Scotland so early as the papal grant of exemption.

20. Teinds are *debita fructuum*, not *fundi*; Teinds for as, by their first condition, the beneficiary might, if he used the proper diligence, make them effectual, by drawing them out of the several crops, he needed no real security. The action, therefore, for bygone teinds is only personal, against those who have intermeddled, either

H h

ther

ther with the teind by itself, or with stock and teind jointly; unless where the titular is infeft in the lands, in security of the valued teind-duty. Where a tenant is, by his tack, bound to pay a joint duty to his landlord for stock and teind, without distinguishing the rent of each, his defence of a *bona fide* payment of the whole to the landlord, has been sustained in a suit at the instance of a laic titular, 21. *March* 1628, *Murray*; but repelled, where a churchman was pursuer, 19. *Feb.* 1629, *Kirk*. In both cases, the proprietor who receives such rent is liable as intermeddler. Every person having right to teinds, whether churchmen or laic titular, has an hypothec upon the fruits, for the payment of his teind, 24. *June* 1662, *Vernor*.—13. *Dec.* 1664, *Bishop of the Isles*; but a purchaser *bona fide*, at a public market, is secure, 20. *Dec.* 1664, *Reid*.

Hypothec
on the
fruits for
the teind

Inhibition
of teinds.

21. In tacks of teinds, as of lands, there is place for tacit relocation; to stop the effect of which, the titular must obtain and execute an inhibition of teinds against the tacksmen, which differs much from inhibition of lands, (explained under the next title), and is intended merely to interpel or inhibit the tacksmen from farther intermeddling. But, if the titular shall, after inhibition, summarily turn out his tacksmen, without a previous sentence, he is liable in a *spuilzie*, 27. *Jan.* 1665, *L. Berford*. This diligence of inhibition may also be used, at the suit of the titular, against any other possessor of the teinds; and, if the tacksmen or possessor shall intermeddle after the inhibition is executed, he is liable in a *spuilzie*.

22. Lands and teinds pass by different titles ; In what a disposition of lands, therefore, tho' granted by one who has also a right to the teind, will not carry the teind, unless it shall appear from special circumstances that a sale of both was designed by the parties, *F. 29. June 1698. Callander.* But, if a proprietor, who has right to his teinds, and who consequently carries his whole corns, without distinguishing between stock and teind, to the same mill, should restrict his lands, the intention of parties is presumed, that the restriction should reach to both. In lands *cum decimis inclusis*, where the teinds are consolidated with the stock, the right of both must necessarily go together in all cases.

TIT. 11. *Of Inhibitions.*

THE constitution and transmission of feudal rights being explained, and the burdens with which they are chargeable, it remains to be considered how these rights may be affected at the suit of creditors, by legal diligence. Diligences are certain forms of law, whereby a creditor endeavours to make good his payment, either by affecting the person of his debtor, or by securing the subjects belonging to him from alienation, or by carrying the property of these subjects to himself. They are either real or personal. Real diligence is that which is proper to heritable or real rights ; personal is that by which the person of the debtor may be secured, or his personal estate affected. Of the first sort we have two, 1. Inhibitions, 2. Adjudication, which law has substituted in the place of apprising.

Inhibition,

how perfected.

2. Inhibition is a personal prohibition, which passes by letters under the signet, prohibiting the party inhibited to contract any debt, or do any deed, by which any part of his lands may be aliened or carried off, in prejudice of the creditor inhibiting. It must be executed against the debtor personally, or at his dwelling-house, according to the order prescribed in the case of summonses by 1540, c. 75. and thereafter published and registered in the same manner with interdictions, 1581, c. 119. No. 1.—1600, c. 13. (1. 7. 33.). Though this diligence requires registration to complete it, yet it secures the creditor who inhibits against all deeds of alienation, even onerous ones, that are granted posterior to the publication of the letters, (4. 1. 15.) provided he shall, within the time statuted, proceed to perfect his diligence by registration, *Dirl.* 254.—*Harc.* 639.

The grounds of inhibition.

Inhibition on a dependence.

3. Inhibition may proceed either upon a liquid obligation, or even on an action commenced by a creditor for making good a claim not yet sustained by the judge; which last is called inhibition upon a depending action. The summons, which constitutes the dependence, must be executed against the debtor before the letters of inhibition pass the signet; for no suit can be said to depend against one, till he be cited in it as a defender, *Br.* 9. *. But the effect of such inhibition is suspended, till decree be obtained in the action against the debtor; and, in the same manner, inhibitions on conditional debts have no effect, till the condition be purified. Inhibitions, as they carry with them a certain

* Vide *New Coll.* 2. 169. and July 19. 1706, *Creditors of Strichen.*

tain degree of reproach, were not granted, by Inhibi-
 the old practice, without a trial of the cause; tions not
 which is still necessary when they proceed on granted,
 conditional debts, 17. July 1713, *Weir*: And of old,
 though, in other cases, inhibitions now pass of *nisi causa*
 course, the Lords are in use to stay them, or, *cognita*.
 if they have passed the signet, to recal them,
 either on the debtor's shewing cause why the
 diligence should not proceed, *F. 15. Feb. 1699,*
Murray *; or even *ex officio*, without the debt-
 or's appearance, where the ground of the dili-
 gence is doubtful, *F. 9. Feb. 1706, Wishart*.

4. Tho' inhibitions, by their uniform style, Inhibition
 disable the debtor from selling his moveable, limited to
 as well as his heritable estate, their effect has heritage.
 been long limited to heritage, from the inter-
 ruption that such an embargo upon moveables
 must have given to commerce, 22. March 1623,
L. Braco; so that debts contracted after inhibi-
 tion may be the foundation of diligence against
 the debtor's person and moveable estate. The
 arrears remaining due on a *debitum fundi* to a
 person inhibited, tho' they be heritably secured,
 are moveable, and therefore do not fall under
 the inhibition, *Falc. vol. 2. 138*. An inhibi-
 tion secures the inhibitor against the alienation,
 not only of the lands that belonged to his debt- Its affects
 or when he was inhibited, but of those that he after ac-
 shall have afterwards acquired, 15. Dec. 1663, quitions.
Ellen; but no inhibition can extend to such
 after-purchasers, as lie in a jurisdiction where
 the inhibition was not registered; for it could
 not have extended to these, tho' they had been
 made prior to the inhibition.

5. This

* Vide *Dict.* vol. 3. p. 188. *Blackwood*.

It does
not strike
against
necessary
deeds ;

nor a-
gainst ju-
dicial
rights.

It is sim-
ply prohi-
bitory.

5. This diligence only strikes against the voluntary debts or deeds of the inhibited person : It does not restrain him from granting necessary deeds, *i. e.* such as he was obliged to grant anterior to the inhibition, since he might have been compelled to grant these before the inhibitor had acquired any right by his diligence. By this rule, a wadsetter or annual-renter might, after being inhibited, have effectually renounced his right to the reverser on payment, because law could have compelled him to it, 7. Jan. 1680, *Maclellan* ; but, to secure inhibitors against the effect of such alienations, it is declared by *Act S. 19. Feb. 1680*, that, after intimation of the inhibition to the reverser, no renunciation or grant of redemption shall be sustained, except upon declarator of redemption brought by him, to which the inhibitor must be made a party. Judicial rights, *e. g.* adjudications, recovered against the inhibited person after the inhibition, upon debts contracted prior thereto, are not hurt by that diligence ; for these are truly the deeds of the law, not of the person inhibited : But an adjudication led on a bond voluntarily granted after inhibition, is reducible.

6. An inhibition is a diligence simply prohibitory, so that the debt on which it proceeds continues personal after the diligence ; and consequently, the inhibitor, in a question with anterior creditors whose debts are not struck at by the inhibition, is only preferable from the period at which his debt is made real by adjudication : And, where debts are contracted on heritable security, tho' posterior to the inhibition, the inhibitor's debt, being personal, cannot
be

be ranked with them; he only draws back from the creditors ranked the sums contained in his diligence. The heir of the person inhibited is not restrained from alienation by the diligence used against his ancestor; for the prohibition is personal, affecting only the debtor against whom the diligence is used.

7. Inhibitions do not, of themselves, make void the posterior debts or deeds of the person inhibited; they only afford a title to the user of the diligence to set them aside, if he finds them hurtful to him: And, even where a debt is actually reduced *ex capite inhibitionis*, such reduction, being founded solely in the inhibitor's interest, is profitable to him alone, and cannot alter the natural preference of the other creditors. Hence, where several investments of annualrent, of different dates, have been granted by the debtor after inhibition, for the payment of all which the debtor's estate is not sufficient, tho' the inhibitor cannot be hurt by any of the posterior contractions, and consequently must draw back his whole debt from the annualrenters, yet the deficiency in the fund of payment must fall, not on the whole of them, *pro rata*, but upon the least preferable, *Falc. vol. 1. 160.* Hence also debts, tho' contracted after inhibition, are not reducible, where the inhibitor would have been totally excluded from the debtor's funds, by debts preferable to his own, tho' these posterior contractions had not been made.

8. Inhibitions may be reduced upon legal purging nullities, arising either from the ground of debt, or the form of the diligence. When payment is made by the debtor to the inhibitor, the inhibition

hibition is said to be purged. Any creditor, whose debt is struck at by the inhibition, may, upon making payment to the inhibitor, compel him to assign the debt and diligence in his favour, that he may make good his payment the more effectually against the common debtor.

TIT. 12. *Of Comprisings and Adjudications.*

Appri-
fings,

were ori-
ginally
proper
sales.

HERITABLE rights may be carried from the debtor to the creditor, either by the diligence of apprising (now adjudication), or by a judicial sale, carried on before the Court of Session. Apprising, or comprising, was the sentence of a sheriff, or of a messenger who was specially constituted sheriff for that purpose, by which the heritable rights belonging to the debtor were sold for payment of the debt due to the appriser. By the Roman law, the debtor's moveable estate was first taken into execution, and, if that was not sufficient, his immoveable, *l. 15. § 2. de re jud.* In the same manner, the debtor's moveables were, by our old law, to be first distrained on a brief of distress; and, in default of these, as much of his heritage was to be sold as would satisfy the creditor, *St. Al. II. c. 24.*; so that apprisings were, by their original constitution, proper sales of the debtor's lands, to any purchaser who offered *. If there was not enough for the

* Vid. *Hist. Law Tracts Appendix*, No. 6.

the creditor's payment within the territory of that sheriff who was first applied to, the crown issued letters to other sheriffs, who were to pursue the same method with the first, 1469, *c.* 37. If no purchaser could be found, the sheriff was to apprise or tax the value of the lands by an inquest, (whence came the name of apprising), and to make over to the creditor lands to the value of the debt.

2. Soon after the act 1469, all letters of apprising issued from the King's signet, and were directed to messengers, as sheriffs in that part. Form of deducing apprisings. The messenger who was employed, searched first for moveables, and, upon finding none, denounced the lands to be appraised, *i. e.* made publication of the intended apprising, upon the ground of the lands, and at the market-cross of the jurisdiction where the lands lay, and left copies of the execution at both places. The letters were also to be executed against the debtor, personally or at his dwelling-place, fifteen days before the actual apprising. By the decree following upon this diligence, such a proportion of the debtor's lands was adjudged to the proprietor, as was taxed by the inquest to amount to the principal sum and penalty contained in the debt, and to the messenger's sheriff-fee, 1. 4. 18.; but the appriser got nothing in name of interest before the reformation. In course of time, all apprisings were led at Edinburgh, whereby persons came frequently to be put on the inquest, utter strangers to the value of the lands; which soon introduced the custom of apprising the whole lands belonging to the debtor, without comparing their value with the extent of the debt. Seven years
11
were,

The legal
reversion
of appri-
sings,
runs not
against
minors.

were, by the act 1469, allowed to the debtor, to redeem the lands apprifed, (called the legal reversion, or the legal); but a minor may redeem at any time within his age of twenty-five, 1621, c. 6. whether he himself be the original debtor, or whether he succeed as heir to the debtor: And where a major succeeds to a minor, against whom the legal of seven years was expired at his death, the major's right of reversion is prorogated for year and day thereafter.

What
subjects
can be
apprifed.

3. Though letters of apprifing contained a power to poind moveables, nothing was *de facto* apprifed by the messenger, but heritable rights. Personal rights of lands may be apprifed, and tacks where assignees are not specially excluded; and even bare faculties or powers competent to a debtor, e. g. a faculty to reduce a deed granted by a minor to his prejudice, *St. Ans. voce Adjudications*; for every pecuniary or patrimonial interest belonging to debtors, ought to be subjected to the diligence of creditors. Offices of trust, conferred on

What of-
fices can
be appri-
fed.

personal considerations, cannot be apprifed; because in these there is a *delectus personae*, not communicable to creditors by diligence: But all offices are apprifable, which either pass by voluntary conveyance, or are so annexed to lands, that they are made descendible to the same heirs, *Falc. vol. 1. 203**. An apprifing, whether of lands, or of a right of annualrent, or other *debitum fundi*, carries no past arrears due upon such right, prior to the decree of apprifing; for, though these are heritably se-
cured,

* Vid. *Kames's Rem. Dec.* 82. & 104.

cured, they are moveable subjects, 13. *March* 1627, *Macghe*.

4. The debt on which the apprising proceeds, must be either liquid in itself, or liquidated by a sentence, to a certain value in money, before leading the diligence; that the precise sum may be known, upon payment of which the debtor can redeem. It must also be a debt, the term of payment whereof is already come; for till then, no creditor can appropriate to himself his debtor's estate; see 11. *Feb.* 1680, *Gordon*.

5. That creditors may have access to affect the estate of their deceased debtor, though the heir should stand off from entering, it is made lawful, by 1540, c. 106. for any creditor, to charge the heir of his debtor to enter to his ancestor, year and day being past after the ancestor's death, within forty days after the charge; and, if the heir fails, the creditor may proceed to apprise his debtor's lands, as if the heir had been entered. Custom has so explained this statute, that the creditor may charge the heir, immediately after the death of his ancestor, provided letters of apprising be not raised till after the expiry both of the year, and of the forty days next ensuing the year, within which the heir is charged to enter, *Act S.* 18. *Feb.* 1721.—*New Coll.* 27 *. But this statute relates only to such charges on which apprising is to be laid against the ancestor's lands; for, in those which are to be barely the foundation of a common summons or process against the heir, action will be sustained if the year

On what debts can apprising proceed.

Apprising upon a charge to enter heir.

* *Vid. Hist. Law Tracts*, vol. 2. p. 120.

Charge,
either ge-
neral or
special.

year be elapsed from the ancestor's death before the execution of the summons, though the forty days should not be also expired, 19. June 1628, *Macculloch*. Though the statute authorises such charges against majors only, practice has also extended it against minors. The provision of this statute is, by 1621, c. 27. extended to the case where the heir is the debtor. One must, in this matter, distinguish between a general and a special charge, though no distinction is made in these statutes. A general charge serves only to fix the representation of the heir who is charged, so as to make the debt his, which was formerly his ancestors: But a special charge makes up for the want of a service, explained 3. 8. 29. and states the heir, *fictione juris*, in the right of the subjects to which he is charged to enter. Where, therefore, the heir is the debtor, a general charge for fixing the representation against him is unnecessary, since the only concern of the creditor is, that his debtor make up titles to the ancestor's estate, which is done by a special charge: But, where the deceased was the debtor, the creditor must first charge his heir to enter in general, that it may be known whether he is to represent the debtor; if he does not enter within forty days, the debt may be fixed against him by a decree of constitution, on which he must be charged to enter heir in special, upon forty days more; and these must be elapsed before the creditor can proceed to apprise.

Appri-
sings are
perfected
by seisin.

6. Apprisings, being transmissions of heritable rights, must be perfected by seisin. The superior of the lands apprised is obliged, by

1469, c. 37. to enter apprisers, on payment of The superior must enter the appriser for a year's rent; which holds, though himself should claim the lands on an exclusive title, 17. July 1632, *Black*; but his entry on a charge, for a being an act of obedience, can hurt no former year's right competent to him. Though there should be many apprisings, the superior gets but one year's rent for all of them, from which the real burdens affecting the lands, arising either from law, or the consent of the superior, must be deducted. If the debt due to the appriser be small in proportion to the value of the lands, the composition is brought lower *ex aequitate*, 30. March 1637, *Paterfon*. Where the crown is superior, no more is exacted from the appriser than one *per cent.* of the principal sum apprised for, when it is below 10,000 merks Scots, though that composition should be lower than the sixth part of the valued rent exacted from singular successors by voluntary purchase. Where the principal is above 10,000 merks, the composition falls to an half *per cent.*

7. Where the superior refused to enter the appriser, the apprising was, by the ancient practice, approved or allowed by the Court of Session, *Hope Min. Pr.* 109. upon which allowance, three consecutive precepts were directed to the superior, commanding him to enter the appriser, *Cr.* 457. § 20, which were no other than the ancient letters of four forms, *arg.* 1647, c. 43.; and, if he still refused, application was made to the immediate higher superior, and so upwards to the sovereign, who refuses none: But now, by long usage, founded on the said act 1647, a simple charge of horning against the superior has been substituted in place

place of the letters of four forms. All apprisings, without distinction, and not those only where the superior was refractory, were, by 1641, c. 54. revived by 1661, c. 31. ordained to be allowed by the Lords; and the allowance, containing a note of the parties names, of the debt, and of the lands, was to be registered in a record to be kept by the clerk of register.

8. After the Reformation, creditors were not only entitled to their principal sums, but to the past interest due upon them; which principal and interest were, in the case of apprising, accumulated by the decree into one sum, carrying interest to the appriser during the not redemption of the lands. Apprisers, therefore, being truly purchasers under redemption, enjoyed the rents of the apprised lands, in satisfaction or *in solutum* of the interest of this accumulate sum, in case they chose to possess during the legal; until, by 1621, c. 6. they became obliged to apply the rents, in so far as they exceeded the interest of their debt, towards extinction of the principal sum; which is extended, in the case of a minor debtor, to the surplus rents during his minority, by 1663, c. 10. On the other part, if the rents fall short of the appriser's interest, the redemption is burdened with the arrears remaining unpaid. An appriser who enters into possession in virtue of a decree, is accountable to the debtor, as if he had continued to possess till the expiring of the legal, though he should have quitted the possession immediately after his entry; because the decree bars all others from intermeddling. If the smallest part of the

Apprisers
are ac-
countable
for the
surplus-
rents du-
ring the
legal;

An appri-
ser who
has begun
to possess
is accoun-
table, as if
he had
continued.

debt

debt or interest remains due at the expiration of the legal, the property of the whole estate is, in strict law, carried irredeemably from the debtor.

9. As apprisings are truly sales under reversion, in payment of the appriser's claim, the arrears of interest due on the accumulate sum are not so properly a debt upon the reverser, as a burden upon his right of reversion; these arrears do not therefore descend upon the appriser's death to his executors, but to his heir, as a part of the right of property constituted by the apprising, 3. *Feb. 1738, Ramsay*: The executors can claim no more than the bygone rents of the lands not levied by the appriser himself, in case he has been in the possession. Yet this right of property does not constitute the appriser vassal in the lands apprised, during the legal, though he should be both infeft and in possession: The reverser continues vassal, in the judgment of law, as long as the right of reversion is competent to him; because so long it is in his power, by payment, to extinguish the apprising, as if it had never been led; and consequently the casualties of superiority fall, during the legal, by the death, not of the appriser, but of the reverser, 24. *July 1739, creditors of Bonbard*.

The bygone interest of the accumulate sum falls not under ex-ecutry.

The appriser is not truly vassal during the legal.

10. Apprising, being a legal diligence, renders the subject to be apprised litigious from the denunciation; the effect of which is, that no voluntary deed granted thereafter by the debtor, tho' before the decree, can hurt the appriser, see *Pr. Falc. 19.*: But a creditor, who neglects the completing of any begun diligence, after a reasonable time, is considered as having relin-

Effect of denunciation.

relinquished it; so that the debtor may, after such dereliction, grant even voluntary deeds, which law will support, 23. July 1674, *Johnston* *.

Reduction
of appri-
sings.

11. Apprisings may be either reduced upon nullities, or redeemed within the legal. They are reduced *in totum* where the defect is gross; as where they are led on a debt not truly due, or where the appriser has neglected any of the necessary solemnities. If the informality be not so essential, the Court of Session, without overturning the apprising *funditus*, sustain it *ex æquitate*, simply as a security for the principal sum and interest, 31. Jan. 1679, *Irvine*; and sometimes also for the accumulations, where the question is not with co-creditors, but with the debtor himself, 3. Nov. 1738, *Balfour*: But the legal of adjudications so restricted, can never expire against the debtor.

Redemp-
tion of ap-
prisings.

12. An apprising may be redeemed, not only by the debtor, but by any posterior appriser, whose diligence is excluded by the first. He who has this right may either use an order of redemption, as in wadsets, 2. 8. 6.; or, if the appriser has been in possession, he may bring an action of count and reckoning against him, for his intromissions. If the appriser's intromissions within the legal amount to his debt, interest, and expences of diligence, including the composition paid to the superior for his entry, and interest thereof, the apprising is, by 1621, c. 6. declared to expire *ipso facto*; but, in this case, singular successors are not secure;

* Vid. Nov. 26. 1764, *Scot cont. Duck. of Douglas.*

cure; for, as intromission consists in fact, it can enter into no record, by which it may be known: And even where an apprising is extinguished by payment made by the debtor himself, the appriser's discharge is good against his singular successors, without being registered in the register of reversions, 23. *July 1662, Lord Fraser*. After redemption, the debtor is under no necessity to renew his feisin; for, upon the extinction of the right of apprising, his former feisin revives.

13. Apprisings were, by the former practice, preferable, according to the dates of the feisins following upon them, where the debtor himself was infest; and, where the right was not perfected by feisin, in the debtor's person, or did not require feisin, the preference was governed by the dates of the apprisings. And even where the first apprising required feisin to complete it, all the posterior apprisings were preferred by their dates; because, the first apprising having divested the debtor of the property, there remained no right to be affected by posterior apprisers, but a reversion, which, like other personal rights, was carried without feisin. See *St. 3. 2. 17.—Gosford, 22. July 1675, Boyd*. But by 1661, c. 62. a *pari passu* preference is established among all apprisings led within year and day of that one which has been first made effectual, either by feisin, or by exact diligence for obtaining feisin. In lands holden of the Crown, the presenting a signature in Exchequer, by the appriser, makes his apprising effectual; in lands holden of a subject superior, a charge against that superior to enter the appriser, is sufficient: And, in both cases,

Apprisings may be extinguished by discharges unregistered.

Preference among apprisers.

The *pari passu* preference of apprisings. What constitutes the first effectual apprising.

the year and day runs from the date of the first apprising, and not from the date of the seisin or diligence whereby it is made effectual, 4. July 1671, L. Balfour. In apprisings of personal rights which admit of no diligence to make them effectual, the first in date is the first effectual apprising; and, consequently, all within year and day of that first, are preferred *pari passu*, 19. Nov. 1734, Jackson. The preference of apprisings after the year falls not within this statute, and therefore is governed by the former law, which preferred all apprisings after the first, by their dates. The co-appriiser, who claimed the benefit of the first appriiser's diligence, must refund to him, not a proportion only, but the whole of the expence disbursed by him, in deducing the apprising, and leading the diligence necessary for making it effectual, 5. Feb. 1663, Græme.

Expence of leading the apprising, on whom it falls.

Seisin on the first apprising is a common right to the co-apprisers.

Charge against the superior has no effect against third parties.

14. The statute declares, that all the adjudgers within year and day, shall be preferred *pari passu*, as if one apprising had been led for the debts contained in all of them; which makes the seisins or diligence on the first apprising a common right to all the co-apprisers within year and day; and consequently, though the first apprising should be redeemed, the diligence upon it still subsists, as to the rest, 7. Nov. 1679, Straiton. The effect given to the presenting of a signature, or to a charge against the superior, is confined to the preference of apprisers among themselves, and does not alter the nature of feudal rights, in competition with third parties: A charge, therefore, upon an apprising, is not equivalent to a seisin, in a question with an infestment of annual-

rent,

rent, K. 48. or with the legal right of terce, K. 56. The same statute prorogates the legal reversion of apprisings from seven to ten years; it saves the former preference due to apprisings that are led on *debita fundi*, 2. 8. 18.; and it gives a right to posterior apprisers to redeem all apprisings purchased by the apparent heir of the debtor, for the sums truly paid for them, at any time within ten years after the purchases: But voluntary acquisitions by apparent heirs, of rights affecting the estate of their ancestors, infer, by our present law, a passive title, 1695, c. 24.

15. The Parliament 1672, c. 19. has, in place of the old form of apprisings by messengers, directed adjudications to proceed against debtors, by way of action before the Court of Session. By that statute, such part only of the debtor's lands is to be adjudged, as is equivalent to the principal sum and interest of the debt, with the composition due to the superior, and expences of infeftment, and a fifth part more, in respect the creditor is obliged to take land for his money; but without penalties or sheriff-fees. The debtor must deliver to the creditor a valid right of the lands to be adjudged, or transumps thereof, renounce the possession in his favour, and ratify the decree of adjudication: and law considers the rent of the lands as precisely commenturated to the interest of the debt; so that the adjudger lies under no obligation to account for the surplus rents. In this, which is called a special adjudication, the legal is declared to be five years; and the creditor attaining possession upon it, can use no farther

Legal reversion is now prorogated to ten years.

Adjudication substituted in place of apprisings.

Special adjudication.

farther execution against the debtor, unless the lands be evicted from him.

General
adjudica-
tion.

16. Where the debtor does not produce a sufficient right to the lands, or is not willing to renounce the possession, and ratify the decree, (which is the case that has most frequently happened), the statute makes it lawful for the creditor to adjudge all right belonging to the debtor in the same manner, and under the same reversion of ten years, as he could, by the former laws, have apprised it. In this last kind, which is called a general adjudication, the creditor must limit his claim to the principal, sum, interest, and penalty, without demanding a fifth part more; see *Act S. 26. Feb. 1684*. But no general adjudication can be insisted on, without libelling in the summons, the other alternative of a special adjudication; for special adjudications are introduced by the statute in the place of apprisings; and it is only where the debtor refuses to comply with the terms thereof, that the creditor can lead a general adjudication.

Abbrevi-
ate of ad-
judica-
tions.

17. By regulations 1695, c. 24. Abbreviates are ordained to be made of all adjudications, after the manner of the former allowances; which are to be signed by the Lord Ordinary who pronounced the decree, and thereafter given in to the clerk of the bills, to be recorded within sixty days after the date of the decree. In every other respect, general adjudications have the same nature and effects that apprisings had; adjudgers in possessions are accountable for the surplus rents; a citation in adjudications renders the subject litigious; superiors are obliged to enter adjudgers; the legal of adjudications does not expire during the debtor's minority,

General
adjudica-
tions are
of the

minority, &c. Only it may be observed, that, though appraisings could not proceed before the term of payment, yet, where the debtor is *vergens ad inopiam*, the court, *ex nobili officio*, admit adjudication for the debt before it be payable, 12. July 1711, *Blaw*: But this sort, being founded solely in equity, subsists merely as a security, and cannot carry the property to the creditor by any length of time, *ibid*.

18. There are two kinds of adjudication, which took place at the same time with appraisings, and still obtain, viz. adjudications on a decree *cognitionis causa*, otherwise called *contra hereditatem jacentem*; and adjudications in implementation. Where the debtor's apparent heir, who is charged to enter, formally renounces the succession, the creditor may obtain a decree *cognitionis causa*, in which, tho' the heir renouncing is cited for the sake of form, no sentence condemnatory can be pronounced against him, in respect of his renunciation; the only effect of it is to subject the *hereditas jacens* to the creditor's diligence. By the old practice, if the debt was liquid, the creditor might, in the process of cognition, protest for adjudication, which was allowed to him summarily, without the necessity of a separate action, *St. 3. 2. 45.*; but now, adjudication cannot pass without a summons for that purpose.

19. Adjudications *contra hereditatem jacentem*, carry not only the lands themselves that belonged to the deceased, but the rents thereof fallen due since his death; for these, as an accessory to the estate belonging to the deceased, would have descended to the heir, if he had entered, 19. Dec. 1638, *Corfar*; which rule is applied

redemption
thereof.

plied to all apprisings or adjudications led on a special charge, by 13. *Feb.* 1740, *L. Kilbucko*. This sort of adjudication is declared redeemable by 1621, *c.* 7. within seven years, (which was then the legal of apprisings), by any co-adjudging creditor either of the deceased debtor, or of the heir renouncing. The heir himself, who renounces, cannot be restored against his renunciation, nor consequently redeem, if he be not a minor, 27. *Jan.* 1680, *Macaulay*: But even a major may redeem indirectly, by granting a simulate bond to a confident person; the adjudication upon which, when conveyed to himself, is a good title to redeem all other adjudications against the lands belonging to his ancestor. The superior of the lands thus adjudged, is laid under the same obligation to enter the adjudger as in the case of apprisings, by 1669, *c.* 18.

Adjudication in
implement.

20. Adjudications in implement are deduced against those who have granted deeds without procuratory of resignation or precept of seisin, and refuse to divest themselves, to the end that the subject conveyed may be effectually vested in the grantee. These adjudications may be also directed against the heir of the granter; in which case *Visc. Stair* asserts that a charge to enter is unnecessary, 3. 2. 52.; but his Lordship's opinion is not supported by practice. Here, there is no place for a legal reversion; for, as the adjudication is led for completing the right of a special subject, it must carry that subject as irredeemably as if the right had been voluntarily completed: And, for the same reason, it being to supply the defect of a special deed, no other adjudication, tho' within

year

year and day, can come in *pari passu* with it,
St. ibid.

21. Adjudications *contra hereditatem jacen-* Adjudi-
tem might have been, before the act 1672, and cations
 consequently may, at this day, be carried on *contra he-*
 before the sheriff; for that act, which gives to *reditatem*
 the Court of Session the exclusive jurisdiction *jacentem*
 in adjudications, can be understood only of pursued
 those which are thereby introduced in place of before the
 appraisings, 4. Jan. 1709, *Ker*. It is pro- sheriff:
 bable that the practice prior to the act 1672
 was the same, with regard to adjudications in
 implement, as the cognizance of these import-
 ed no higher jurisdiction than that of other ad-
 judications; and upon that practice the question
 depends, whether they may now be brought
 before the sheriff, for they are not compre-
 hended under the statute. The regulations
 1695, art. 24. had ordained abbreviates of ad- They
 judications to be signed by the Lord Pronoun- must have
 cer, in place of the former allowances: And, abbrevi-
 tho' there were no allowances of adjudications ates.
 on decrees *cognitionis causa*, yet, by additional
 regulations 1696, art. 3. abbreviates of these
 were also directed to be signed. Since that
 time, it has been the general practice, where
 such adjudications were led before the she-
 riff, to get their abbreviates signed by him;
 and, where they have no abbreviates, the Court
 of Session refuses to grant letters of horning
 on them against superiors, *Act S. 2. Dec.*
 1742.

22. Before treating of judicial sales of bank-
 rupt estates, the nature of sequestration may
 be shortly explained, which is a diligence
 that generally ushers in actions of sale. Se-
 questration

Sequestration
of land
estates,

when
compe-
tent.

What
subjects
fall under
sequestra-
tion.

Factors on
sequestered
estates,

sequestration of lands is a judicial act of the Court of Session, whereby the management of an estate is put into the hands of a factor or steward named by the Court, who gives security, and is to be accountable for the rents to all having interest. This diligence is competent, either where the right of the lands is doubtful, if it be applied for before either of the competitors has attained possession; or where the estate is heavily charged with the debts: But, as it is an unfavourable diligence, it is not admitted, unless that measure shall appear necessary for the security of creditors. Subjects, not brought before the Court by the diligence of creditors, cannot fall under sequestration; for it is the competition of creditors which alone founds the jurisdiction of the Court to take the disputed subject into their possession. Hence, a creditor, whose debt is not made real on the lands in question, has no title to demand it; and the arrestment of rents from year to year can only affect a sequestration of the rents arrested, but not of the lands themselves, 13. Feb. 1745, creditors of *Ochertyre*.

23. The Court of Session, who decrees the sequestration, has the nomination of the factor, in which they are directed by the recommendation of the creditors. Writers were, by *Act S. 23. Nov. 1710*, declared incapable of this office; and, tho' an objection be seldom made upon that act, yet, when it is offered, the Court sustains it. The debtor's apparent heir may be also accounted an improper factor, as the same grounds of suspicion that lie against the debtor himself, commonly strike with equal force against

gainst his heir, both in point of neccessitous circumstances, and of design against the creditors; but, where no opposition is made, nothing hinders him from being named. A factor appointed by the session, tho' the proprietor had not been infest in the lands, has a power to remove tenants, *New Coll. vol. 2. 41.* contrary to the general rule stated 2. 6. 23. The rules by their duty, which a judicial factor must conduct himself, are contained in several acts of sederunt. By *Act S. 22. Nov. 1711, § 6. 7. 8.* factors must, within six months after extracting their factory, make up a rental of the estate, and a list of the arrears due by tenants, to be put into the hands of the clerk of the process, as a charge against themselves, and a note of such alterations in the rental as may afterwards happen; and must also deliver to the clerk annually a scheme of their accounts, charge and discharge, under heavy penalties. They are, by the nature of their office, bound to the same degree of diligence that a prudent man adhibits in his own affairs; and by *Act S. 31. July 1690.* they are accountable for the interest of the rents, which they either have, or by diligence might have recovered, from a year after their falling due. As it is much in the power of those factors to take advantage of the necessities of creditors, by purchasing their debts at an undervalue, all such purchases made either by the factor himself, or to his behoof, are declared equivalent to an acquittance or extinction of the debt, by *Act S. 25. Dec. 1708.* No factor can warrantably pay to any creditor, without an order of the court of session; for he is, by the tenor of his commission, directed to pay the rents to

Salary of
factors.

Factors
without
sequestra-
tions.

Sale of
bankrupt
estates.

those who shall be found to have best right to them. Judicial factors are entitled to a salary, which is generally stated at five *per cent.* of their intromissions; but it is seldom ascertained till their office expires, or till their accounting; that the court may modify a greater or smaller salary, or none, in proportion to the factor's integrity and diligence, 22 *June* 1711, *Heriot*: See also *Act* S. 23. *Nov.* 1711. Many cases occur, where the court of session, without sequestration, name a factor to preserve the rents from perishing; *e. g.* where an heir is deliberating whether to enter, where a minor is without tutors, where a succession opens to a person residing abroad, &c. *St.* 4. 50. 28.; in all which cases the factor is subjected to the rules laid down in *Act* S. 13. *Feb.* 1730.

24. The word *bankrupt* is in our law sometimes applied to persons whose funds are not sufficient for their debts; and sometimes, not to the debtor, but to his estate. There was no method known in our law for the proper sale of a bankrupt estate, so as the price might be divided among the creditors, till 1681, *c.* 17.; by which the court of session was empowered, at the suit of any real creditor, to try the value of the debtor's estate, and name commissioners to sell it, for the payment of his debts: But, as the commissioners named by the session in pursuance of this act, were generally backward to undertake so ungrateful an office, and as the consent of the debtor, which the statute required where his right of reversion was not expired, could seldom be obtained, it was enacted, by 1690, *c.* 20. that decrees of sale of bankrupt estates should be pronounced by the court itself, and
that

that such sales might proceed in all cases without the consent of the debtor.

25. No process of sale, at the suit of a creditor, can proceed without a proof of the debtor's bankruptcy by said act 1690, *Act S. 24. Feb. 1692*, or at least, as Lord *Stair* softens it, 4. 51.

6. unless his lands be so charged with debts, that prudent persons will not buy from him; and therefore the summons of sale must comprehend the debtor's whole estate. The debtor, or his apparent heir, and all the real creditors in possession, must be made parties to the suit; but it is sufficient if the other creditors be called by an edictal citation, *Act S. 23. Nov. 1711. § 1.*

The summons of sale contains a conclusion of ranking or preference of the bankrupt's creditors. In this ranking, first and second terms are assigned to the whole creditors for exhibiting in court (or producing) their right and diligences, which must be published in the *Edinburgh Evening Courant*, according to the directions of *Act S. 17. Jan. 1756*; and it is thereby declared, that the decree of certification proceeding thereupon, against the writings not produced, shall have the same effect in favour of the creditors who have produced their rights, as if that decree had proceeded upon an action of reduction-improbation, 4. 1. 5.

The ranking of these creditors must be concluded by an extracted decree, before the actual sale, at least to the extent of the value put on the lands by the court of session, *Reg. 1695. art. 26.* The irredeemable property of the lands is adjudged by the court to the highest offerer at the sale. The creditor's receiving payment must grant to the purchaser absolute

The security of judicial purchasers.

warrandice,

warrandice, to the extent of the sum received by them, *Act S.* 31. *March* 1685; and the lands purchased are, by 1695, c. 6. declared disburdened of all debts or deeds of the bankrupt, or his ancestors, either on payment of the price by the purchaser to the creditors, according to their preference, or on consignation of it, in case of their refusal, in the hands of the magistrates of Edinburgh: The only remedy provided by the act, to such creditors as judge themselves hurt by the sale or division of the price, even tho' they should be minors, is an action for recovering their share of the price against the creditors who have received it.

On whom
does the
expence
of the
sale fall.

26. The expence of these processes was at first disbursed by the factor, out of the rents in his hands; by which the whole burden of such expence fell upon the posterior creditors. By *Act S.* 23. *Nov.* 1711, § 9. it was proportioned among all the creditors, according to the shares that they should severally draw of the price; because actions of sale and ranking redounded to the common benefit of them all. But as this last regulation cut off the preferable creditors from their claim of expences, which the nature of their rights or diligences entitled them to, matters were again put on the first footing, by *Act S.* 10. *Aug.* 1754.

Apparent
heirs may
pursue a
sale.

27. Apparent heirs are entitled, by 1695, c. 24 to bring actions of sale of the estates belonging to their ancestors, whether bankrupt or not; which privilege is not lost to them, tho' they should behave as heirs, 28. *Feb.* 1733, *Blair*. The expence of these actions ought to fall upon the pursuer, where there appears to be any excrecence of the price, after payment

of the creditors; because, in such case, he is presumed to act for himself: But, where there is no excrescence, the creditors, who alone are gainers by the sale, ought to be burdened with the expence of it.

28. As processes of ranking and sale are designed for the common interest of all the creditors, no diligence carried on, or completed during their pendency, ought to give any preference in the competition; *pendente lite nihil innovandum*. Hence, in a competition between a creditor who had adjudged, pending an action of sale, and another who, that he might not be excluded by the first adjudger, had led a second within year and day of the first, but after the sale, the two adjudications were preferred *pari passu*; though the last, having been led after the right of the lands had been transferred from the debtor, was an improper diligence, *Falc. vol. 1. 233.*

29. It is a rule in all real diligences, that, where a creditor is preferable on several different subjects, he cannot use his preference arbitrarily, by favouring one creditor more than another, but must allocate his universal or catholic debt proportionally against all the subjects or parties whom it affects. If it is material to such creditor to draw his whole payment out of any one fund, he may apply his debt so as may best secure himself; but that inequality will be rectified as to the posterior creditors, who had likewise, by their rights and diligences, affected the subjects out of which he drew his payment, by obliging him to assign in their favour his right upon the separate subjects which he did not use in the ranking; by which

Diligen-
ces penden-
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fectual.

The appli-
cation of
catholic
rights in a
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tion.

which they may recur against these separate subjects for the shares which the debt preferred might have drawn out of them. As the obligation to assign is founded merely in equity, the catholic creditor cannot be compelled to it, if his assigning shall weaken the preference of any separate debt vested in himself, affecting the special subject sought to be assigned. But, if a creditor upon a special subject shall acquire from another a catholic right, or a catholic creditor shall purchase a debt affecting a special subject, with a view of creating to the special debt a higher degree of preference than was naturally due to it, by an arbitrary application of the catholic debt, equity cannot protect him from assigning in favour of the creditor excluded by such application, especially if, prior to the purchase, the subject had become litigious by the process of ranking, for transmissions ought not to hurt creditors who are no parties to them, nor to give the purchaser any new right, which was not formerly in himself to his cedent. This head of our law is accurately discussed in an essay on the *beneficium cedendarum actionum*.

It is, in the last place, to be observed on this head, that, although a creditor adjudging on debt should happen to recover a part of it out of any separate funds belonging to his debtor, over which his adjudication did not reach, he does not thereby diminish the security acquired to him by his adjudication, which remain to him as broad for the last shilling, as for the whole debt. *E. of London, 16. Feb. 1734, and New Coll. ii 127.*

B O O K III.

TIT. I. *Of Obligations and Contracts in general.*

THE law of heritable rights being explained, moveable rights fall next to be considered, the doctrine of which depends chiefly on the nature of Obligations. An obligation is a legal tie, by which one is bound to pay or perform something to another. Every obligation on the person obliged, implies an opposite right in the creditor, so that what is a burden in regard to the one is a right with respect to the other; and all rights founded on obligation are called personal. There is this essential difference between a real and a personal right, that a *jus in re*, whether of property, or of an inferior kind, as servitude, entitles the person vested with it to possess the subject as his own, or if he is not in possession, to demand it from the possessors; whereas the creditor in a personal right has only *jus ad rem*, or a right to compel the debtor to fulfill his obligation; without any right in the subject itself, which the debtor is bound to transfer to him. It is said in the definition, *to pay or to perform*. The first, to pay, relates properly to those subjects, which the debtor is bound to deliver to

Obligations or personal rights.
Difference between real and personal rights.

to the creditor, and is generally limited to sums of money. The other alternative, to perform, includes all articles consisting in fact, as an obligation to dispoſe, or to procure ſomething to be done for the creditor. One cannot oblige himſelf, but by a preſent act of the will. A bare reſolution, therefore, or purpoſe to be obliged, is alterable at pleaſure, 27 Feb. 1673, *Kinnaird*.

Obligations are either merely natural,

2. Obligations are either, firſt, merely natural, where one perſon is bound to another by the law of nature, but cannot be compelled, by any civil action, to the performance. Thus, tho' deeds granted by a minor having curators, without their conſent, are null, yet the minor is naturally obliged to perform ſuch deeds; and parents are naturally obliged to provide their children in reaſonable patrimonies. Natural obligations had, by the Roman law, moſt of the effects of proper ones, except the right of action; by ours, they entitle the creditor to retain what he has got in virtue thereof, without being ſubjected to reſtore it, 3. 3. 17. and a fidejuſſory obligation may be interpoſed to them,

merely civil,

3. 3. 24.—2. Obligations are merely civil, which may be ſued upon by an action, but are elided by an exception in equity; this is the caſe of obligations granted through force or fear, &c. 3. Proper or full obligations, are thoſe which are ſupported both by equity and the civil ſanction.

or mixed:

They are either pure, *ex die*,

3. Obligations may be alſo divided into, 1. Pure, to which neither day nor condition is adjoined. Theſe may be exacted immediately l. 41. §. 1. *de verb. obl.* 2. Obligations (*ex die*) which have a day adjoined to their performance. In theſe, *dies ſtatim cedit, ſed non venit*;

a proper debt arises, from the date of the obligation, because it is certain that the day will exist; but the execution is suspended, till the lapse of that day. 3. Conditional obligations, or conditional, in which there is no proper debt (*dies non credit*) till the condition be purified, because it is possible the condition may never exist; and which, therefore, are said to create only the hope of a debt, § 4. *Inst. de verb. obl.*; but the granter, even of these, has no right to refuse. An obligation, to which a day is adjoined that possibly may never exist, implies a condition; *dies incertus pro conditione habetur, l. 21. pr. quando dies leg.* Thus, in the case of a provision to a child, payable when he attains to the age of fourteen, if the child dies before that age, the provision fails, 16. Feb. 1677, *Belfebes*.

4. Obligations, when considered with regard to their cause, were divided by the Romans, into those arising from contract, quasi-contract, delict, and quasi-delict: But there are certain obligations, even full and proper ones, which cannot be derived from any of these sources, and to which Lord Stair gives the name of obidental. Such is, among obidental obligations; the obligation of parents to aliment or maintain their children; which arises singly from the relation of parent and child, and may be enforced by the civil magistrate, *l. 5. § 10 de agn. lib.* Under parents are comprehended the mother, grandfather, and grandmother, in their proper order, *d. l. 5. § 2.* This obligation on parents extends to the providing of their issue in all the necessities of life, and giving them suitable education, *d. l. 5. § 12.* It ceases

ceases when the children can earn a livelihood by their own industry; but the obligation on parents to maintain their indigent children, and reciprocally, on children to maintain their indigent parents, is perpetual, *l. ult. § 5. C. de bon. quae lib.* This obligation is, on the father's death, transferred to the eldest son, the heir of the family; who, as representing the father, must aliment his younger brothers and sisters: The brothers are only entitled to alimony till their age of twenty-one, after which they are presumed able to do for themselves; but the obligation to maintain the sisters continues till their marriage, 8. Feb. 1739, *Douglass*. In persons of lower rank, the obligation to aliment the sisters ceases, after they are capable of subsisting by any service or employment.

Obligations arising from the duty of restitution.

5. All obligations, arising from the natural duty of restitution, fall under this class: Thus, things given upon the view of a certain event, must be restored, if that event does not afterwards exist, *Tit. ff. de cond. causa data; c. 3.* what is given in contemplation of a marriage which never followed: Thus also, things given *ob turpem causam*, where the turpitude is in the receiver and not in the giver, must be restored to the owner, *l. 1. § 2. de cond. ob turp. caus.*: And on the same principle, one upon whose ground a house is built or repaired by another, is obliged, without any covenant, to restore the expence laid out upon it, in so far as it has been profitable to him, 23. Feb. 1665, *Juck*.

Obligations by contract.

6. A contract is the voluntary agreement of two or more persons, whereby something

is to be given or performed upon one part, for a valuable consideration, either present or future, on the other part. Consent, which is implied in agreement, is excluded, 1. By error in the essentials of the contract, *l. 15. de jurisd.* Consent is implied in contracts.

—*l. 9 pr. de contr. empt.*; for, in such case, the party does not properly contract, but errs, or is deceived: And this may be also applied to contracts which take their rise from fraud or imposition. 2 Consent is excluded by such a degree of restraint upon any of the contracting parties, as extorts the agreement; for, where violence or threatnings are used against a person, his will has really no part in the contract. Contracts were, by the Roman law, perfected, either *re*, by the intervention of things; or by words; or by writing; or by sole consent. In order to perfect real contracts, one of the parties must have actually given or performed something to the other: If there was barely an obligation to give or perform, it resolved into a *nudum pactum*, which was not productive of an action; but, by the law of Scotland, one who obliges himself to lend, or give in pledge, may be compelled to performance. The real contracts of the Romans are loan, commodate, depositation, and pledge. Real contracts.

7. Loan, or *mutuum*, is that contract which obliges a person, who has borrowed any fungible subject from another, to restore to him as much of the same kind, and of equal goodness. *Mutuum* Whatever receives its estimation in number, weight, or measure, is a fungible, as corn, wine, current coin, &c. The only proper subjects of this contract, are things which cannot be used without either their extinction or alienation; its proper subjects;
hence,

the obli-
gations,

and action
arising
from it.

Commo-
date.

What de-
grees of
diligence

hence, the property of the thing lent is necessarily transferred, by delivery, to the borrower, who, consequently, must run all the hazards, either of its deterioration or its perishing, according to the rule, *res perit suo domino*. Where the borrower neglects to restore at the time and place agreed on, the estimation of the thing lent must be made according to its price at that time and in that place; because it would have been worth so much to the lender if the obligation had been duly performed. If there is no place nor time stipulated for, the value is to be stated according to the price that the commodity gave, when and where it was demanded. In the loan of money, the value put on it by public authority, and not its intrinsic worth, is to be considered. This contract is obligatory only on one part; for the lender is subjected to no obligation: The only action, therefore, that it produces, is pointed against the borrower, that he may restore as much in quantity and quality as he borrowed, together with the damage the lender may have suffered through default of due performance.

8. *Commodate* is a species of loan, gratuitous on the part of the lender, where the thing lent may be used, without either its perishing or its alienation. Hence, in this sort of loan, the property continues with the lender; the only right the borrower acquires in the subject is its use, after which he must restore the individual thing that he borrowed: Consequently, if the subject perishes, it perishes to the lender, unless it has perished by the borrower's fault. What degree of fault or negligence makes either of the contracting parties liable to the other in damages

damages, is comprehended under the following are required in contracts. Where the contract gives a mutual benefit to both parties, each contractor is bound to exhibit a middle sort of diligence, such as a man of ordinary prudence uses in his affairs, the neglect of which is called *culpa levis*. Where only one of the parties has benefit by the contract, that party must use exact diligence, the opposite of which is *culpa levissima*; and the other who has no advantage by it, is accountable only *de dolo vel culpa lata*, for dolo, l. 5. § 2. *Com.* or for gross omissions which the law construes to be dolo, l. 226. *de verb sign.* Where one employs less care on the subject of any contract which implies an exuberant trust, than he is known to employ in his own affairs, it is considered as dolo, l. 32. *depos.*

9. By these rules, the borrower in the contract of commodate must be exactly careful of the thing lent, and restore it at the time fixed by the contract, or after that use is made of it for which it was lent: If he puts it to any other use, or neglects to restore it at the time covenanted, and if the thing perishes thereafter, even by mere accident, he is bound to pay the value. On the other part, the lender is obliged to restore to the borrower such of the expences disbursed by him on the subject, as arose from any uncommon accident, but not those that naturally attend the use of it, l. 18. § 2. *commod.* The essential obligations consequent on this contract lie upon the borrower: The action therefore competent to the lender against him, for fulfilling his part, is called the direct action of commodate; and that which is competent to the borrower

Obligations arising from commodate.

The direct and contrary actions of commodate.

*Preca-
um.*

rower upon the counter-part of the contract, is called the contrary action. Where a thing is lent gratuitously, without specifying any time of redelivery, it constitutes the contract of *precarium*, which is revokable at the lender's pleasure, and, being entered into from a personal regard to the borrower, ceases by his death, *l. 12. § 1. de prec.*

Deposita-
tion :

The obli-
gations
arising
from it.

10. Deposition is a contract, by which one who has the custody of a thing committed to him, (the depositary), is obliged to restore it to the depositor. If a reward is bargained for, by the depositary for his care, it resolves into the contract of location. As this contract is gratuitous, the depositary is only answerable for the consequences of gross neglect; but after the deposit is redemanded, he is accountable even for casual misfortunes. He is entitled to a full indemnification for the losses he has sustained by the contract, and to the recovery of all sums expended by him on the subject: But he had no right, by the civil law, to retain the subject itself for his reimbursement; the exuberant trust which was implied in the contract excluded all right, both of compensation and retention, *l. 11. C. depos.*

*Nautae,
caupones,
stabularit.*

11. By an edict of the Roman Pretor, which is, with some variations, adopted into our law, an obligation arises, without formal paction, barely by a traveller's entering into an inn, ship, or stable, and there depositing his goods, or putting up his horses; whereby the innkeeper, shipmaster, or stabler, is accountable, not only for his own facts and those of his servants, (which is an obligation implied in the very exercise of these employments), but of the o-
ther

ther guests or passengers; and, indeed, in every case, unless where the goods have been lost *damno fatali*, or carried off by pirates or house-breakers. This edict, so contrary to common rules, was found necessary *ad reprimendam improbitatem hoc genus hominum*, l. 1. § 1. 8. *naut. caup.* Not only the masters of ships, but their employers, are liable upon this edict, l. 1. § 2. 3. *ibid.* each of them for the share that he has in the ship, l. 7. § 5. *ibid.* But, by the present custom of trading nations, goods brought into a ship do not fall under it, unless they are delivered to the master or mate, or entered into the ship-books. Carriers fall within the intendment of this edict; and practice has extended it to vintners within borough, F. 17. Feb. 1687, *Forbes*. The extent of the damage sustained by the party may be proved by his own oath, *in litem*, 4. Dec. 1661, *White*.

27 Sequestration, whether voluntarily consented to by the parties, or authorised by the judge, is a kind of deposit; but, as the office of sequestree, to whose care the subject in dispute is committed, is not considered as gratuitous, he cannot throw it up at pleasure, as a common depositary may do; and he is liable in the middle degree of diligence. Confignation of money is also a deposit. It may be made, either where the debt is called in question by the debtor, as in suspensions; or where the creditor refuses to receive his money, as in wadsets, &c. The risk of the consigned money lies on the consigner, where he ought to have made payment, and not confignation, 9. July 1675, *E. Queensberry*; or has consigned only a part; or lies.

Consigned
money
ought not
to be put
to interest.

or has chosen for consignatory a person neither named by the parties nor of good credit. The charger, or other creditor, runs the risk, if he has charged for sums not due, or has without good reason refused payment, by which refusal, the consignment became necessary, 28. *July* 1665, *Scot.* It is the office of a consignatory, to keep the money in safe custody, till it be called for: If therefore he puts it out at interest, he must run the hazard of the debtor's insolvency; but, for the same reason, tho' he should draw interest for it, he is liable in none to the configner; see 3. 9. 21. *ad fin.*

Pledge.

13. Pledge, when opposed to wadset, is a contract, by which a debtor puts into the hands of his creditor, a special moveable subject in security of the debt, to be redelivered on payment. Where a security is established by law to the creditor, upon a subject which continues in the debtor's possession, it has the special name of an hypothec. Of hypothecs in the moveables there was a great variety among the Romans; but our law has, for preserving the free currency of trade, reduced them to a narrower compass. Tradesmen and ship-carpenters have an hypothec on the house or ship repaired, for the materials and other charges of reparation, 16. *Nov.* 1711, *Watson*; but not for the expence of building a new ship, *K.* 68. because the necessity is not so urgent: Owners of ships have an hypothec on the cargo, for the freight, *Hume, Dec.* 1683, *Mure*; Heritors on the fruits of the ground; and landlords on the *investa et illata*, for their rents, 2. 6. 26. Writers also, and agents, have a right of hypothec, or more properly of retention, in their constituent's

Hypo-
thec.

Hypo-
thecs con-
stituted
by the
law of
Scotland.

constituent's writings, for their claim of pains and disbursements. A creditor cannot, for his own payment, sell the subject impignorated, even after denunciation to the debtor, as he might have done by the Roman law, *l. 4. de pign. act.* He must apply to the judge ordinary, for a warrant to put it up to public sale or roup; and to this application the debtor ought to be made a party.

TIT. 2. Of Obligations by Word or Writ.

THERE is nothing in the law of Scotland analogous to the *verborum obligatio* of the Romans, which was created by the parties uttering certain *verba solennia*, or words of style: And therefore the appellation of *verbal* may be properly enough applied by us, to all obligations to the constitution of which writing is not essential, which includes both real and consensual contracts; but, as these are explained under separate titles, obligations by *word*, in the sense of this rubric, must be restricted, either to promises, or to such verbal agreements as have no special name to distinguish them. Agreement implies the intervention of two different parties, who came under mutual obligations to one another. Where nothing is to be given or performed, but on one part, it is properly called a promise which, as it is gratuitous, does not require the acceptance of him to whom the promise is made. An offer, which must be distinguished from a promise, implies something

Verbal agreement.

Promise,

Offer.

N n

thing

thing to be done by the other party; and consequently is not binding on the offerer, till it be accepted, with its limitations or conditions, by him to whom the offer is made; after which it becomes a proper agreement. The different methods of proof required for supporting these different obligations, are to be explained, 4. 2. 11. and 12-

Writing must intervene, in obligations concerning heritage.

Locus poenitentiae,

when excluded.

Writing is unnecessary in *pactis liberatoris*.

2. Writing must necessarily intervene in all obligations and bargains concerning heritable subjects, tho' they should be only temporary; * as tacits, which, when they are verbal, last but for one year. In these, no verbal agreement is binding, tho' it should be referred to the oath of the party; for, till writing is adhibited, law gives both parties a right to refile, as from an unfinished bargain; which is called *lo-*

cus poenitentiae. † Yet it has been adjudged, that a written offer to sell, signed by one of the parties, when it is delivered to, and verbally accepted by the other, becomes obligatory on the offerer; tho' there should be no written acceptance, or other obligation, signed by the party to whom the offer is made, 23. Nov. 1748, Lord *Kilkerran*. If, upon a verbal bargain of lands, part of the price shall be paid by him who was to purchase, the *interventus rei*, the actual payment of money, creates a valid obligation, and gives a beginning to the contract of sale, *F. 23, Dec. 1697. Laury*: And, in general, wherever matters are no longer entire, the right to refile seems to be excluded. An agreement, whereby a real right is passed from, or restricted, called *pactum liberatorium*, may be

* *Vid. McKenzie Nov. 15. 1764 Bisset—1765.*

† *Kilk. Locus poenitentiae No 1.*

be perfected verbally, 8. Feb. 1666, *Ker*; for freedom is favourable, and the purpose of such agreement is rather to dissolve than to create an obligation. Writing is also essential to bar- In what other in-
 gains made under condition that they should be stances
 reduced into writing; for, in such cases, it is writing is
pars contractus, that, till writing be adhibited, essential.
 both parties shall have liberty to withdraw, 12. Jan. 1676, *Campbell*. In the same manner, verbal or nuncupative testaments are rejected by our law; but verbal legacies are sustained, where they do not exceed *L. 100 Scots*, 3. 9. 2.

3. Anciently, when writing was little used, Solemnities of
 deeds were executed by the party appending written
 his seal to them; but, even then, the presence obligations,
 of witnesses at the sealing was necessary, as appears by our oldest writings yet extant; see *R.*

M. l. 2. c. 38. § 1.—Cr. 186. § 17. For Subscrip-
 preventing frauds that might happen by ap- tion by
 pending seals to false deeds, the subscription also the party
 of the granter was required by 1540, *c. 117.*; before
 and, if he could not write, that of a notary: or by a
 But this act not having expressly required the notary
 subscription of the witnesses, it was thought suf- for him.
 ficient to insert their names in the body of the
 deed. As it might be of dangerous conse-
 quence, to give full force to the subscription of
 the parties by initials, (the first letters of the
 name and surname), which is more easily coun-
 terfeited; our practice, in order to sustain such
 subscription, seems to require a proof, not only
 that the granter used to subscribe in that way,
 but that *de facto* he had subscribed the deed
 in question, 21. June 1681, *Coutts*; at least,
 such proof is required, if the instrumentary
 witnesses

witnesses be still alive, *Harc.* 894.—*July 1729, Thomson.*

4. As a further check, it is provided by 1579, c. 80. that all writings carrying any heritable right, and other deeds of importance, be subscribed by the principal parties, if they can subscribe; otherwise, by two notaries, before four witnesses specially designed, (or distinguished). The subsequent practice extended this requisite of the designation of the witnesses, according to the plain intendment of the statute, to the case where the parties themselves subscribed; but, in regard that the words of the act were not clear in that particular, therefore, when the witnesses were not specially designed in a deed, or perhaps not so much as named, the party founding on it was, by the indulgence of our judges, allowed to condescend who the witnesses were; which condescendence was to be ascribed, either by the witnesses themselves, if alive; or *ex comparatione literarum*, where they were deceased, and had also subscribed as witnesses: And this obtained with respect to all deeds granted after this statute, till act 1681, c. 5. which declares the omission to the designations not suppliant by any condescendence, *New Coll.* 84. Custom has construed obligations for sums exceeding *L.* 100, *Scots*, to be obligations of importance, which is probably founded on *Act S.* 8. *June 1597*, establishing that sum as the standard, beyond which payments were not allowed to be proved by witnesses. In a divisible obligation, *ex. gr.* for a sum of money, tho' exceeding *L.* 100: the subscription of one notary is sufficient, if the creditor restricts his claim to *L.* 100: But, in an obligation indivisible, *e. g.* for the performance of

The omission to design witnesses not now suppliant.

What obligations are deemed of importance.

of a fact, if it be not subscribed in terms of the statute, it is void. When notaries thus attest a deed, the attestation or docquet must specially express, that the granter gave him a mandate to sign; nor is it sufficient that this be mentioned in the body of the writing, 18. *June 1745, Birrel.*

Notaries must express the mandate in the docquet.

5. In every deed, the name of him who writes it, with his dwelling-place or other mark of distinction, must be inserted, 1593, c. 175. The witnesses must, by the foresaid act 1681, both subscribe as witnesses, and their names and designations be inserted in the body of the deed: And all subscribing witnesses must know the granter, and either see him subscribe, or hear him acknowledge his subscription, otherwise they are declared punishable as accessory to forgery. Deeds, decrees, and other securities, consisting of more than one sheet, may be written by way of book, in place of the former custom of pasting together the several sheets, and signing the joinings on the margin; provided each page be signed by the granter, and marked by its number; and the testing clause express the number of pages, 1696, c. 15.

The writer's name must be inserted.

Deeds may be written bookwise.

6. Instruments of feisin are valid, if subscribed by one notary, before a reasonable number of witnesses, *August 1584, c. 4.* which is extended by practice to instruments of resignation. Two witnesses are deemed a reasonable number to every deed that can be executed by one notary, 15. *July 1680, Bishop of Aberdeen.* In instruments of feisin, of resignation *ad remanentiam*, and of intimation, the witnesses must subscribe, and their names and designations must be inserted in the instrument, 1681, c. 5. Feisins were allowed, by 1686, c. 17. to be written

Solemnities of notarial instruments,

ten

and of ex-
ecutions
by mes-
sengers.

ten bookwise; the notary attesting the number of leaves, and signing each leaf, with the witnesses. As the number of leaves was seldom condescended on or specified, as the act directed, an objection founded on that omission was repelled, *New Coll.* 2. But by *Act S.* 17. *Jan.* 1756, not only is this condescendence required in seifins, but the marking each page by its number, in terms of 1696, *c.* 15. which related, not to seifins, but to securities. Executions by messengers and other officers of the law were at first valid, barely by affixing their stamp or signet, without subscription, 1543, *c.* 74. The subscription of the officer came to be required by 1592, *c.* 139. ; and, at last, by 1686, *c.* 4. the subscription also of witnesses is made necessary, and the necessity of stamping taken off. The act 1681 requires also the designation of the witnesses, in certain sorts of executions, *viz.* inhibition, interdiction, horning, and arretment; Executions, therefore, of summonses fall not under this act, 8. *Dec.* 1736, *Napier*; for, the enumeration of some particulars implies the exclusion of all others. It is not necessary, that the witnesses to a notorial instrument, or execution, see the notary or messenger sign; for they are called as witnesses to the transaction which is attested, and not to the subscription of the person attesting; see 5. *July* 1710, *Lord Gray*.

Deeds
must be
written on
stamped
paper.

7. A new requisite has been aded to certain deeds since the union, for the benefit of the revenue: They must be executed on stamped paper, or parchment, paying a certain duty to the crown. Charters, instruments of resignation, seifins, and retours of lands holden of a subject, are charged with 2s. 3d. of duty, 10.

Ann.

Ann. c. 19. : Bonds, tacks, contracts, and other personal obligations, paid at first 6*d.* *12. Ann. stat. 2. c. 9. § 21.* ; to which a farther duty of 1*s.* has been since added by 30. *George II. c. 19.* bail-bonds are specially excepted from the statute *12. Ann.* Neither do bills, testaments, discharges, or acquittances of rent or of interest, nor any judicial deeds, as notorial instruments, bonds of cautionry in suspensions, &c. fall under it.

8. The inserting of the time and place of Is the
 subscribing, being a strong guard against forge- mention
 ry, is considered by Visc. *Stair*, 4. 42. 19. as es- of the date
 sential to all deeds; but the contrary has been or place
 found by two judgments, 15. *Feb.* 1706, *Dun-* necessary?
can.—21. *July* 1711, *Ogilvy.* The granter's
 name and designation are essential, not proper-
 ly as solemnities, but because no writing can
 have effect without them. Bonds were, by our Blank
 ancient practice, frequently executed without bonds.
 filling up the creditor's name; and they passed
 from hand to hand, like notes payable to the
 bearer: But, as there was no method for the
 creditor of a person possessed of these to secure
 them for his payment, all writings taken blank
 in the creditor's name are declared null, as co-
 vers to fraud; with the exception of indorfa-
 tions of bills of exchange, 1696, *c. 25.*

9. Certain privileged writings do not require Privile-
 the ordinary solemnities. 1. Holograph deeds ged deeds.
 (written by the granter himself) are effectual Holo-
 without witnesses. A deed is holograph, where graph
 the substantial of it are written by the gran- writings.
 ter, 23. *Jan.* 1675, *Vanse.* The date of no ho-
 lograph writing, except a bill of exchange,
 (see next §), can be proved by the granter's own
 assertion,

Testa-
ments.

assertion, in prejudice either of his heir or his creditors, but must be supported by other administrations, 21. *June 1665, Braidy* 2. Testaments, if executed where men of skill in business cannot be had, are valid, tho' they should not be quite formal, *F. 1. Jan. 1708, Ker* : And, let the subject of a testament be ever so valuable, one notary signing for the testator, before two witnesses, is in practice sufficient. Clergymen were frequently notaries before the Reformation; and, though they are, by 1584, c. 133. prohibited to act as notaries, the case of testaments is excepted; so that these are supported by the attestation of one minister, with two witnesses.

Discharges to tenants.

Merchants accounts or letters.

3. Discharges to tenants are sustained without witnesses, from their presumed rusticity, or ignorance in business, 7. *Nov. 1674, Boyd*. 4. Missive letters *in re mercatoria*, commissions, and fitted accounts in the course of trade, and bills of exchange, tho' they are not holograph, are, from the favour of commerce, sustained without the ordinary solemnities.

Bills of exchange,

10. A bill of exchange is an obligation in the form of a mandate, whereby the drawer or mandant desires him to whom it is directed, to pay a certain sum, at the day and place therein mentioned, to a third party. Bills of exchange are drawn by a person in one country to his correspondent in another; and they have that name, because it is the exchange, or the value of money in one place compared with its value in another, that generally determines the precise extent of the sum contained in the draught. The creditor in the bill is sometimes called the possessor, or *porteur*. As parties to bills are of different countries, questions concerning

cerning them ought to be determined by the received custom of trading nations, unless where special statute interposes. For this reason, bills of exchange, tho' their form admits not of witnesses, yet prove their own dates, in questions either with the heir, or creditors of the debtor, *K. 57.*; but, if this doctrine should be extended to the case of such inland bills as are made payable to the drawer himself, and where consequently the only persons concerned are the drawer and acceptor; heirs might, by antedated bills, be cut off from the plea of deathbed, and creditors from the benefit of inhibition, *Bank. vol. 1. 364.*

11. A bill is valid without the designation either of the drawer, or of the person to whom it is made payable: It is enough, that the drawer's subscription appears to be truly his; and one's being possessor of a bill marks him out to be the creditor, if he bears the name given in the bill to the creditor: Nay, tho' the person drawn on should not be designed, his acceptance presumes, that it was he whom the drawer had in his eye, *K. 96.* Bills drawn blank, in the creditor's name, fall under the statute 1696; for, though indortations of bills are excepted from it, bills themselves are not. Not only the person drawn upon must sign his acceptance, but the drawer must sign his draught, before any obligation can be formed against the acceptor; bills being really mandates: Yet it is sufficient in practice that the drawer signs, before the bill be produced in judgment; tho' it should be after the death both of the creditor and acceptor, *Falc. vol. 2. 15.*

A creditor in a bill may transmit it to another Indorser by

by indorstation, tho' the bill should not bear *to his order*; by the same rule that other rights are transmissible by assignation, tho' they do not bear, *to Assignees*, K. 78.

Obligations on the drawer;

on the person drawn upon; on the indorser.

Effects of payment by the acceptor.

Bills are considered as cash.

12. The drawer, by signing his draught, becomes liable for the value to the creditor in the bill, in case the person drawn upon either does not accept, or, after acceptance, does not pay; for he is presumed to have received value from the creditor at giving him the draught, tho' it should not bear *for value received*: But if the drawer was debtor to the creditor in the bill before the draught, the bill is presumed to be given towards payment of the debt, unless it expressly bears *for value*, 18. July 1712, *Cheep*. The person drawn upon, if he refuse to accept, while he has the drawer's money in his hands, is liable to him in damages. As a bill presumes value from the creditor, indorstation presumes value from the indorsee; who, therefore, if he cannot obtain payment from the acceptor, has recourse against the indorser, unless the bill be indorred in these words, *without recourse*.

13. Payment of a bill, by the acceptor, acquits both the drawer and him at the hands of the creditor; but it entitles the acceptor, if he was not the drawer's debtor, to an action of recourse against him; and, if he was, to a ground of compensation. Where the bill does not bear value in the hands of the person drawn upon, it is presumed that he is not the drawer's debtor; and consequently he has recourse against the drawer *ex mandato*, 4. July 1711, *Cunningham*.

14. Bills, when indorred, are considered as so many bags of money delivered to the one-
rous

rous indorsee; which therefore carry right of the contents, free of all burdens that do not appear on the bills themselves. Hence, a receipt or discharge, by the originally creditor, if granted on a separate paper, does not exempt the acceptor from second payment to the indorsee; hence also, no ground of compensation competent to the acceptor against the original creditor can be pleaded against the indorsee: But if the debtor shall prove, by the oath of the indorsee, that he paid not the full value for the indorsement, the indorsee is justly considered as but a name; and therefore all exceptions, receivable against the original creditor, will be sustained against him, 15. Jan. 1708 *Crawford*.

15. Bills must be negotiated by the possessor, Negotia-
against the person drawn upon, within a pre- tion or di-
cise time, in order to preserve recourse a- ligence re-
gainst the drawer. It might be thought, that, quired in
where a bill is payable so many days after the credi-
sight, the possessor ought, without delay, to pre-
sent it for acceptance, and, in case of refusal,
protest; because the least delay in presenting
such bill prolongs the term of payment, in pre-
judice of the drawer: Yet the contrary doctrine
has prevailed in practice, that, in bills payable
so many days after sight, the creditor has a dis-
cretionary power of fixing the payment some-
what sooner or later, as his occasions shall re-
quire, *New Coll.* 2. 99. It is unquestionable,
that bills payable on a day certain, need not be
presented for acceptance, till the day of pay-
ment, because that day can neither be prolong-
ed nor shortened by the time of acceptance,
K. 93.—*Falc.* vol. 2. 75. For the same reason,
the

the acceptance of bills, payable on a precise day, need not be dated: But, where a bill is drawn payable so many days after sight, it must; because there the term of payment depends on the date of the acceptance.

Days of
grace.

16. Tho' bills are, in strict law, due the very day on which they are made payable, and may therefore be protested on the day thereafter; yet there are three days immediately following the day of payment, called days of grace, within any of which the creditor may protest the bill: But, if he delay protesting till the day after the last day of grace, he loses his recourse, 29 Jan. 1751, *Cruikshanks*. Where a bill is protested either for not acceptance, or not payment, the dishonour must be notified to the drawer or indorser, within three posts at farthest*. This strictness of negotiation is confined to such bills as may be protested by the possessor upon the third day of grace: here therefore bills are indorsed after the days of grace are expired, the indorsee is left more at liberty, and does not lose his recourse, though he should not take a formal protest for not payment, if, within a reasonable time, he shall give the indorser notice of the acceptor's refusing to pay, *Falc. vol. 2. 76*. Not only does the possessor, who neglects strict negotiation, lose his recourse against the drawer, where the person drawn upon becomes afterwards bankrupt, but, though he should continue solvent; for he

Bills in-
dorsed af-
ter the
term of
payment.

When
does the
creditor
lose re-
course a-
gainst the
drawer.

* This strictness appears to be relaxed by some of the late decisions of the court, *Elliot 14 Feb. 1780; Hodgson 18. July 1782*; and the only rule appears now to be, that there shall be *no undue delay* on the part of the holder of a dishonoured bill, *Carrick 23. June 1790*.

he may, in that case, recover payment from the debtor, and so is not to be indulged in an unnecessary process against the drawer, which he has tacitly renounced by his negligence, *Dec. 1744, Littlejohn*. Recourse is preserved against the drawer, tho' the bill should not be duly negotiated, if the person drawn upon was not his debtor; for there the drawer can qualify no prejudice by the neglect of diligence, and he ought not to have drawn on one who owed him nothing.

17. The privileges superadded to bills by statute, are, that tho', by their form, they can have no clause of registration, yet if duly protested, they are registrable within six months after their date, in case of not acceptance, or in six months after the term of payment, in the case of not payment; which registration is made the foundation of summary diligence, either against the drawer or indorser, in the case of not acceptance, or against the acceptor, in case of not payment, 1681, c. 20. This statute is extended by 1696, c. 36. to inland bills, *i. e.* bills both drawn and made payable in Scotland. After acceptance, summary diligence lies against no other than the acceptor; the drawer and indorser must be pursued by an ordinary action. It is only the principal sum in the bill, and interest, that can be charged for summarily: The exchange, when it is not included in the draught, the re exchange incurred by suffering the bill to be protested and returned, and the expence of diligence, must all be recovered by an ordinary action; because these are not liquid debts, and so must be previously constituted;

Privileges
of bills by
statute.

Inland
bills or
precepts.

ted ; but, in the case of suspension. they may be added to the charge, 1681, *c.* 20.

Certain
bills are
not privi-
leged.

18 Bills, when drawn payable at any considerable distance of time after date, are denied the privileges of bills ; for bills are intended for currency, and not to lie as a security in the creditor's hands, *K.* 55. *ad fin.* Bills are not valid which appear *ex facie* to be donations, 25. *Nov.* 1736, *Weir.* No extrinsic stipulation ought to be contained in a bill which deviates from the proper nature of bills ; hence, a bill to which a penalty is adjected, is null, see *K.* 99. ; and a bill with a clause of interest from the date, *New Coll.* vol. 2. 57. Inland precepts drawn, not for money the medium of trade, but for fungibles, were, by the former practice, admitted as probative, tho' without the privilege of bills, *Br.* 82. ; but, by later decisions, they have been declared null, as wanting writer's name and witnesses. Promissory notes, without writer and witnesses, were adjudged to be null, 29. *Jan.* 1708, *Arbuthnot.* It was afterward the opinion of the court, that they required no witnesses, *F.* 7. *Dec.* 1711, *King.* By our former law, promissory notes were not entitled to the special privileges of bills, *ibid.* *Horne* 113. But, by the act 12. *Geo.* 3. and subsequent statute 23. *Geo.* 3. *c.* 18. they are put upon the same footing with bills, with respect to summary execution, and all their other privileges.

Solemnities of
deeds
signed in
a foreign
country.

17. As for the solemnities essential to deeds signed in a foreign country, when they come to receive execution in Scotland, it is a general rule, that no laws can be of authority beyond the dominions of the lawgiver. Hence, in strictness, no deed, though perfectly according
to

to the law of the place where it is signed, can have effect in another country where different solemnities are required to a deed of that sort. But this rigour is so softened *ex comitate*, by the common consent of nations, that all personal obligations, granted according to the law of that country where they are signed, are effectual every where, *K. 23.*; which obtains even in obligations to convey heritage, 5 July 1706, *Cunningham*. Conveyances themselves, if they are of heritable subjects, must be perfected according to the law of the country where the heritage lies, and from which it cannot be removed, *Feb. 1729, E. Dalkeith*; but a conveyance of moveables, which have no fixed seat, and are therefore said to follow the owner, if it be perfected according to the *lex domicilii*, will receive execution in Scotland, 16 July 1636, *Sinclair*.—*Dirl. 390.*

20. A writing, while the grantor keeps it under his own power or his doer's, has no force; it becomes obligatory, only after it is delivered to the grantee himself, or found in the hands of a third person. As to which last, the following rules are observed. A deed found in the hands of one, who is doer both for the grantor and grantee, is presumed to have been put in his hands, as doer for the grantee, 1735, *Seton*. The presumption is also for delivery, if the deed appears in the hands of one who is a stranger to both; see *St. 4. 42. 8*. Where a deed is deposited in the hands of a third person, the terms of deposition may be proved by the oath of the deponent, 5 March 1624 *Hay*; unless where they are reduced into writing, 24 Feb. 1675, *Cowan*. A deed appearing in the custody

Delivery.

and de-
position
of deeds.

What
deeds are
effectual
without
delivery.

custody of the grantee himself, is considered as his absolute right; insomuch that the granter is not allowed to prove that it was granted in trust, otherwise than by a written declaration signed by the trustee, or by his oath, 1696, *c.* 25.

21. The following deeds are effectual without delivery. 1. Writings containing a clause dispensing with the delivery: These are of the nature of revokable deeds where the death of the granter is equivalent to delivery, because after death there can be no revocation. 2. Deeds in favour of children, even natural ones; for parents are the proper custodians or keepers of their children's writings, 25. *Feb.* 1663, *Aikenhead*. From a similar reason, postnuptial settlements by the husband to the wife need no delivery, *Br.* 78. 3. Rights which are not to take effect till the granter's death, or even where he reserves an interest to himself during his life; for it is presumed he holds the custody of these, merely to secure to himself such reserved interest, 19. *June* 1668, *Haldane*. 4. Deeds that the granter lay under an antecedent natural obligation to execute, *e. g.* rights granted to a cautioner for his relief, 18. *Jan.* 1677, *Dick*. 5. Mutual obligations, *e. g.* contracts; for every such deed, the moment it is executed, is a common evident to all the parties contractors; see 10. *Dec.* 1736, *Simpson*. Lastly, the publication of a writing by registration, is equivalent to delivery, *Dirl.* 272.

TIT.

TIT. 3. Of Obligations and contracts arising from consent, and of accessory Obligations.

CONTRACTS consensual, *i. e.* which might, by the Roman law, be perfected by sole consent, without the intervention either of things, or of writing, are sale, permutation, location, society, and mandate. Where the subject of any of these contracts is heritable, writing is necessary.

2. Sale is a contract, by which one becomes obliged to give something to another, in consideration of a certain price in current money to be paid for it. *Arrhae*, or earnest, is sometimes given by the buyer, as an evidence that the contract is perfected; but this is not necessary. Earnest was computed in the price, by the Roman law; but what is given here under that name, is generally so inconsiderable, that it is *dead* earnest, *i. e.* not reckoned in the price. Things not yet extant, and consisting merely in hope, may be the subject of this contract, as the draught of a net, &c. *l. 8. § 1. de contr. empt.* Commodities, where their importation or use is absolutely prohibited, cannot be the subject of sale; and, even in run goods, no action lies against the vendor for not delivery, if the buyer knew the goods were run, *11. Geo. 1. c. 30.*; see *16. Nov. 1736, Scougal.* The price in current money may be fixed, either, 1. By the agreement of parties at making the contract; in which case, let it be ever so disproportioned to the value of the subject, the sale is valid by our law, *23. June 1669. Fairy,*
P p though

though it was otherwise by the Roman, *l. 2. C. de rescind. vend.* Or, 2. By a reference, either to a third person, or even to one of the contracters themselves, 13. *March 1639. E. Montrose.*

*Periculum
rei vendi
tae necdum
traditae.*

• 3. Though this contract may be perfected before delivery of the subject, the property remains till then, with the vendor, 2 *l. 10.* Notwithstanding which, if the subject perished, it perished, by the Roman law, to the buyer, § 3. *Inst. de empt. et vend.* contrary to the rule, *res perit domino*; because the property in the vendor was considered to be but nominal, he being obliged to transfer it to the buyer. Lord Stair doubts, whether this would hold in our practice, 1. 14. 7. But, whatever ought to be the rule, in case of the extinction of the subject, it is an agreed point, that the hazard of its deterioration falls on the purchaser, because he has all the profits arising from it, after the sale. On the other hand, it is certain, that the subject itself perishes to the vendor; 1. If it should perish through his fault, or after his undue delay to deliver it*. 2. If a subject is sold as a fungible, and not as an individual, or *corpus*, *l. 35. § 7. de contr. empt. e. g.* a quantity of farm-wheat, sold without distinguishing the parcel to be delivered, from the rest of the farm. 3. The *periculum* lies on the vendor till delivery, if he be obliged by a special article in the contract to deliver the subject at a certain place. *F. 25. Jan. 1687, Spence.*

*Emption
a non do
mimo.*

4. The vendor, where he is not the true owner, cannot, by delivery, transfer to the purchaser that property which was not his to give;

* *D. l. 13. § 8. de act. empt.*

give; but the purchaser, in respect of his *bona fides*, makes the fruits of the subjects his own, till it be evicted, or at least reclaimed, by the true owner, 2. 1. 14. : And as warrandice is implied in all sales, the vendor must make the subject good, if it be evicted, 2. 3. 11. The insufficiency of the goods sold, if it be such as would have hindered the purchaser from buying, had he known it, and if he quarrels it recently, founds him in an action (*actio redhibitoria*) *Actio redhibitoria.* for annulling the contract. If the defect was not essential, he was, by the Roman law, entitled to a proportional abatement of the price, by the action *quantum minoris* : But as our practice does not allow sales to be reduced, on account of the disproportion of the price to the value of the subject, it is probable, that it would also reject the action *quantum minoris*. A vendor who covenants, by a *pactum de retrovendendo*, *Pactum de retrovendendo.* for a right to redeem the subject within a certain time, cannot after that time be restored against his delay, by offering the redemption-money, as a reverter in a wadset might do before declarator; for in sales, an adequate price is presumed to be given to the vendor, and so there is nothing penal in the irritancy, 2. 8. 5. Permutation differs from a sale chiefly in this, *Permutation.* that, in permutation, one subject is to be given in barter or exchange for another; whereas the price in a sale consists of current money.

5. Location is that contract, where an hire is stipulated for the use of things, or for the service of persons. It may, without impropriety, be considered as a species of sale, in which the subject sold is the use or service; and the price is the hire, which, as in a proper sale, generally

ally consists of money. He who lets his work, or the use of his property to hire, is the locator or lessor; and the other, the conductor or lessee. In the location of things, the lessor is obliged to deliver the subject, fitted to the use it was let for; and the lessee must preserve it carefully, put it to no other use, and, after that is over, restore it. Where a workman or artificer lets his labour, and if the work is either not performed according to contract, or if it be insufficient, even from mere unskilfulness, he is liable to his employer in damages, *l. 9. § 5. locat.* for he ought not, as an artificer, to have undertaken a work to which he was not equal. A servant hired for a certain term, is entitled to his full wages, tho' from sickness, or other accident, he should be disabled for a part of his time; but, if he die before the term, his wages, are only due for the time he actually served. If a master dies, or without good reason turns off, before the term, a servant who eats in his house, the servant is entitled to his full wages, and to his maintenance till that term: And, on the other part, a servant, who without ground deserts his service, forfeits his wages and maintenance, and is liable to his master in damages. The doctrine of location of lands is already explained, *2. 6 8. et seq.*

Society.

6. Society, or copartnership, is a contract, whereby the several partners agree, concerning the communication of loss and gain arising from the subject of the contract. It is formed by the reciprocal choice that the partners make of one another; and so is not constituted in the case of co heirs, or of several legatees in the same subject. A copartnership may be
so

so constituted, that one of the partners shall, either from his sole right of property in the subject, or from his superior skill, be entitled to a certain share of the profits, without being subjected to any part of the loss: But a society, *Societas leonina.* where one partner is to bear a certain proportion of loss, without being entitled to any share of the profits, is justly reprobated. All the partners are entitled to shares of profit and loss proportioned to their several stocks, where it is not otherwise covenanted.

7. As partners are united, from a *delectus personae*, in a kind of brotherhood, no partner can, without a special power contained in the contract, transfer any part of his share to another. Where therefore a third person is assumed by a partner, such assumption forms a separate contract betwixt the assumer and the assumed, limited to the share of the partner assuming, and in which the others have no concern. Upon the same principle, all benefit procured by one of the partners to himself, in a matter that naturally falls under the copartnership, accrues to the whole, 26. March 1624, *Inglis*; and no partner is accountable for an error in management, arising from the want of a larger share of prudence, or skill, than he was truly master of.

8. All the partners are bound *in solidum* by the obligation of any one of them, if he subscribe by the *firm* or social name of the company; unless it be a deed that falls not under the common course of administration, as if a partner should take upon him to refer a company-claim to an arbiter, Nov. 1728, *Lumsdame*. Each partner is obliged to advance the sums

Societas leonina.

Obligations on the *socii*;

their powers to transfer;

they are all bound *in solidum*, for the company-debts.

fums necessary for carrying on the common affairs according to his share; and he is entitled to the reimbursement of the fums he has expended, or of the loss he has sustained on the company's account, out of the common stock; and, if that falls short, the other partners are liable *in solidum* to make up the loss, he bearing his own proportion thereof. The company-effects are the common property of the society subjected to its debts; so that no partner can claim a division thereof, even after the society is dissolved, till these are paid: And, consequently, no creditor of a partner can, by diligence, carry to himself the property of any part of the common stock, in prejudice of a company-creditor; but he may, by arrestment, secure his debtor's share in the company's hands, to be made forthcoming to him at the close of the copartnership, in so far as it is not exhausted by the company debts.

How far a partner's share is affectable by creditors.

Society expires by death, or renunciation. 9. Society being founded in the mutual confidence among the *socii*, is dissolved, not only by the renunciation, but by the death of any one of them, if it be not otherwise specially covenanted, l. 65. § 9. *pro socio*. A partner, who renounces upon unfair views, or at a critical time, when his withdrawing may be fatal to the society, looses his partners from all their engagements to him, while he is bound to them, for all the profits he shall make by his withdrawing, and for the loss arising thereby to the company, § 4. *Inst. b. t.* Not only natural, but civil death, *e. g.* arising from a sentence inflicting capital punishment, makes one incapable to perform the duties of a partner, and consequently dissolves the society. In both

both cases, of death and renunciation, the remaining partners may continue the copartnership either expressly, by entering into a new contract, or tacitly, by carrying on their trade as formerly. Tho' this contract was dissolved, by the Roman law *egestate*, by the bankruptcy of any of the partners, *l. 4. § 1. pro soc.*; yet, by our practice, if, after goods are bought on the company's credit, one of the partners should fail, the rest cannot pocket up the whole profits, on pretence that they run the whole risk, *July 1749. Paterfon.* Public trading companies are now every day constituted, with rules very different from those which either obtained in the Roman law, or at this day obtain in private societies. The proprietors or partners in these, tho' they may transfer their shares, cannot renounce, nor does their death dissolve the company, but the share of the deceased descends to his representative.

Is it dissolved *egestate*?

10. A joint trade is not a copartnership, but a momentary contract, where two or more persons agree to contribute a sum, to be employed in a particular course of trade, the produce whereof is to be divided among the adventurers, according to their several shares, after the voyage is finished. If, in a joint trade, that partner who is intrusted with the money for purchasing the goods, should, in place of paying them in cash, buy them upon credit, the furnisher, who followed his faith alone in the sale, has no recourse against the other adventurers; he can only recover from them what of the buyer's share is yet in their hands. Where any one of the adventurers, in a joint trade, becomes bankrupt, the others are preferable

A joint trade differs from a copartnership.

rable to his creditors, upon the common stock, as long as it continues undivided, for their relief of all the engagements entered into by them on account of the adventure, 11. Jan. 1740, creditors of *Macaul*.

Mandate.

Obligations on the mandatary.

11. Mandate is a contract, by which one employs another to manage any business for him; and, by the Roman law, it must have been gratuitous. It may be constituted tacitly, by one's suffering another to act in a certain branch of his affairs, for a tract of time together without challenge. The mandatary is at liberty not to accept of the mandate; and as his powers are solely founded in the mandate's commission he must, if he undertakes it, strictly adhere to the directions given him: Not is it a good defence, that the method he followed was more rational; for in that his employer was the proper judge. Where no special rules are prescribed, the mandatary, if he acts prudently, is secure, whatever the success may be; and he can sue for the recovery of all the expences, reasonably disbursed by him in the execution of his office.

What is comprehended under a general mandate.

12. Mandates may be general, containing a power of administering the mandant's whole affairs; but no mandate, however ample, can be construed into an order to commit a crime, which, being itself criminal, cannot be inferred by implication. Neither does any mandate imply a power of disposing gratuitously of the constituent's property; nor even of selling his heritage for an adequate price: But a general mandatary may sell such of the moveables as must otherwise perish (*quae servando servari nequeunt*.) No mandatary can, without special powers,

powers, enter the mandant heir to his ancestor, transact doubtful claims belonging to him, or refer them to arbiters.

13. Mandates expire, 1. By the revocation How of the employer, tho' only tacit, as if he should name another mandatary for the same business. ^{mandates expire.}

2. By the renunciation of the mandatary; even after he has executed part of his commission, if his office be gratuitous. 3. By the death either of the mandant or mandatary; for the one is presumed to give, and the other to accept the mandate, from personal regards of friendship: But, if matters are not entire, the mandate continues in force, notwithstanding such revocation, renunciation, or death. Procuratories of resignation, and precepts of seisin, are made out in the form of mandates; but, because they ^{Mandates gratia mandata- iii.}

are granted for the sole benefit of the mandatary, all of them, excepting precepts of *clare constat*, are declared to continue after the death either of the granter, or grantee 1693, c. 35. Deeds which contain a clause or mandate for registration, are for the same reason made registrable after the death of either, 1693, c. 15.-- 1696, c. 39.

14. The favour of commerce has introduced a tacit mandate, by which masters of ships are empowered to contract in name of their exercitors or employers, for repairs, ship-provisions, and whatever else may be necessary for the ship or crew; so as to oblige, not themselves only, but their employers, l. 1. § 17. *de exerc. act.* An exercitor is he who employs a ship in trade, whether he be the owner, or only freights her from the owner. Whoever has the actual charge of the ship is deemed the ^{Tacit mandate.} ^{Exerci-} master, bound by

the contract of the master of the ship.

Institutors by their contracts bind their employers.

Homologation;

in what cases it is excluded.

master, tho' he should have no commission from the exercitors, or should be substituted by the master, in the direction of the ship, without their knowledge. *l. 1. § 5. ibid.* Exercitors are liable, whether the master has paid his own money to a merchant for necessaries, or has borrowed money to purchase them. The furnisher or lender must prove that the ship needed repairs, provisions, &c. to such an extent; but he is under no necessity to prove the application of the money or materials to the ship's use. If there are several exercitors, they are liable, *singuli in solidum*. In the same manner, the undertaker of any branch of trade, manufacture, or other land-negotiation, is bound by the contracts of the institutors whom he sets over it, in so far as relates to the subject of the *praepositura*; And tho' the institutors be pupils, and so cannot bind themselves, the prepositor, who, knowing their state, gave them a power to contract for him, stands obliged by their deeds, *l. 7. § 2. de inst. act.*

15. Contracts and obligations, in themselves imperfect, receive strength, by the contractor or his heirs doing any act thereafter which imports an approbation of them, and consequently supplies the want of an original legal consent. This is called homologation, and it takes place, even in deeds intrinsically null, whether the nullity arises from the want of statutory solemnities, 21. *Jan. 1735, Tailfar*; or from the incapacity of the grantor, 28. *June 1671, Hume*. It cannot be inferred, 1. By the act of a person who was not in the knowledge of the original deed; for one cannot approve what he is ignorant of. Hence, one's subscribing as witness

ness to a deed, does not infer homologation; for witnesses are only called to attest the subscription without being told the contents: But a brother's signing as witness to his sister's marriage-contract, presumes his knowledge and homologation of the articles, from his near relation to the bride, *Forbes MS. 15. July 1714, Davidson*. And yet, an heir's witnessing a deed granted by his ancestor *in test*, does not infer homologation, let the relation be ever so near, because of the authority which the ancestor is presumed to have over the heir, *F. 13. Jan. 1704, Dallas. 2*. Homologation has no place, where the act or deed which is pleaded as such, can be ascribed to any other cause; for an intention to come under an obligation is not presumed; hence, charters, or precepts granted by superiors, in obedience to a charge, infer no homologation. Marriage-contracts, without witnesses, have been found to be homologated by subsequent marriage; but, in truth, marriage, which is entered into frequently without any previous written contract, can, in no view, be deemed an approbation of special marriage-articles.

16. Quasi contracts are formed without explicit consent, by one of the parties doing some thing that by its nature either obliges him to the other party or the other party to him. Under this class may be reckoned tutory, *l. 7. 12. &c.* the entry of an heir, *3. 8. 26. &c. negotiorum gestio, indebiti solutio*, communion of goods, between two or more common proprietors, and *mercium jactus levandae navis causa. Negotiorum Negotio-gestio* forms those obligations which arise from the management of a persons affairs in his absence,

sence, by another, without a mandate. As such managers act without authority from the proprietor, he ought to be liable in exact diligence, *l. 24. C. de Usur.* unless he has, from friendship, interposed in affairs which admitted of no delay, *l. 3. § 9. de neg. gest.*; and he is accountable for his intromissions with interest. On the other part, he is entitled to the recovery of his necessary disbursements on the subject, tho', by misfortune, it should have perished afterwards, *l. 10. § 1. de neg. gest.* and to be relieved of the obligations in which he may have bound himself in consequence of the management.

Indebiti solutio.

17. *Indebiti solutio*, or the payment to one of what is not due to him, if made thro' any mistake, either of fact, or even of law, *26. July 1733, Stirling*, founds him who made the payment, in an action against the receiver for repayment (*condictio indebiti*). This action does not lie, 1. If the sum paid was due *ex aequitate*, or by a natural obligation; for the obligation to restore is founded solely in equity. 2. If he who made the payment knew that nothing was due; for *qui consulto dat quod non debebat, praesumitur donare*. Some lawyers add a third case viz. if the sum was paid in consequence of a transaction: But, where a sum is so paid, there is no *indebitum*; the transaction itself creates a debt, tho' no prior debt had existed.

Right of dividing common property.

18. Where two or more persons become common proprietors of the same subject, either by legacy, gift, or purchase, without the view of co-partnership, an obligation is thereby created among the proprietors to communicate the profit and loss arising from the subject, while it remains common: And the subject might,

might, by the Roman law, be divided at the suit of any one of them, by the action *communi dividundo*. No such action, in relation to commonty-lands, was competent by our law, till 1695, c. 38. which authorised the division of commonties, before the court of session, at the suit of any having interest. This division, where the question is among the common proprietors, is to be governed by the last clause in the statute, *according to the valuation of their respective properties*: But, where the question turned between the proprietors and those that had servitudes upon the property, the rules mentioned in a preceding clause of the act took place by the former practice, *according to the value of the interests of the several persons concerned*: Hence, proprietors were allowed a *praecipuum* for their right of property, over and above the share, on account of their own or their tenant's possession by pasturage, K. 42.; but now the superficies is only divided, without prejudice to the property; see next §.

19. It has been doubted, what is to be understood by *commonty*: The word, in proper speech, supposes two common proprietors at least; and yet, in our law-language, and in characters, it frequently signifies a heath or moor, tho' it should belong in property to one, if there has been a promiscuous possession upon it by pasturage; and the act 1695 excepts commonties belonging in property to the King, or to royal boroughs. The question, therefore, whether action lies upon the statute, where there is but one proprietor, at the suit of those who have servitudes upon it, has been variously decided. By the last judgment, *Falc. vol. 1. 251.*
the

What is understood to be commonty.

Division
of runrig
lands.

the court, waving the general point, directed the surface of the common to be divided in that case, according to the interest of the several parties in that surface, without prejudice to the right of property. Another act of the same year, c. 23. authorised the division of lands lying runrig, and belonging to different proprietors, with the exception of borough and incorporated acres; the execution of which is committed to the judge-ordinary, or justices of the peace.

*Lex Rhod-
ia de jac-
tu.*

20. The throwing of goods overboard, for lightening a ship in a storm, creates an obligation by the Rhodian law *de jactu*, which the Romans, and other trading nations, have made their own; whereby the owners of the ship and goods saved, are obliged to contribute for the relief of those whose goods were thrown over board, that so all may bear a proportional loss of the goods ejected for the common safety. In this contribution, the goods ejected are valued at prime cost, and the ship and goods saved, at the price they may give at the next port, *l. 2. § 4. de leg. Rhod.*; but the ship's provisions suffer no estimation, *l. 3. § 2. eod. t.* A master, who has cut his matt, or parted with his anchor, to save the ship, is entitled to this relief, *l. 3. eod. t.*; but, if he has lost them by the storm, the loss falls only on the ship and freight. If the ejection does not save the ship, the goods preserved from the shipwreck are not liable in contribution. By the later laws of *Wijby*, art. 20. ejection may be lawfully made, if the master and a third part of the mariners judge that measure necessary, tho' the owners of the goods should oppose it: And the goods ejected are

to be valued at the price that the goods of the same sort which are saved shall be afterwards sold for.

21. There are certain obligations, which cannot subsist by themselves, but are accessions to or make a part of other obligations. Of this sort are fidejussion, and the obligation to pay interest. Cautionry, or fidejussion, is that obligation by which one becomes engaged as security for another, that he shall either pay a sum, or perform a deed.

22. A cautioner for a sum of money may be bound, either simply, as cautioner for the principal debtor, or conjunctly and severally, for and with the principal debtor. The first has, both by the Roman law, *Nov. 4. c. 1.* and by our customs, the *beneficium ordinis*, or of discussion; by which the creditor is obliged to discuss the proper debtor, before he can insist for payment against the cautioner. By discussing, is not barely meant the making a demand of the debt: The person of the debtor must be discussed by denunciation, and by registering the horning; his moveable estate by pointing, or arrestment and forthcoming; and his heritage by adjudication, 24. July 1662, *Brisbane*. Where one is bound as full debtor with and for the principal, or conjunctly and severally with him, the two obligants are bound equally in the same obligation, each *in solidum*; and, consequently, the cautioner, though he is but an accessory, may be sued for the whole, without either discussing, or even citing the principal debtor. Cautioners for performance of facts by another, or for the faithful discharge of an office, e. g. for factors, tutors, &c.

Accessory obligations.

Caution-

for a sum of money.

A simple cautioner has the benefit of discussion.

Cautioner bound conjunctly and severally.

Cautioner for performance of facts,

is in every
case enti-
tled to dis-
cussion.

Et c. cannot, by the nature of their engagement, be bound conjunctly and severally with the principal obligant, because the fact to which the principal is bound cannot possibly be performed by any other. In such engagements, therefore, the failure must be previously constituted against the proper debtor, before action can be brought against the cautioner, for making up the loss of the party suffering.

*Beneficium
divisionis*
among co-
caution-
ers.

23. In the case of two or more cautioners, each of them, by the Roman law, pronounced the obligatory words by himself, and so became bound to the creditor *in solidum*; until the *beneficium divisionis* was introduced, by which cautioners were entitled to insist, that the obligation might be divided among all of them *pro rata*, § 4. *Inst. de fidejuf.* By our law, all the co-cautioners are bound in the same writing, so that there is no place for this benefit: For, when they become obliged conjunctly and severally, the plain intention of parties is, that the obligation should not be divided; and, where they are bound simply as cautioners, each co-cautioner is, by the genuine nature of such obligation, without any privilege, liable only for his own proportion, while the other obligants are solvent, except where the obligation is in itself indivisible.

Fidejuf-
sion is an
obligation
merely
natural.

24. Fidejussion may be interposed to an obligation merely natural, in which the cautioner is effectually bound, tho' the principal debtor should get free: Thus, a cautioner in a bond not legally attested as to the principal debtor, lies under a proper engagement, because the statutory nullity, on which the principal escapes,
does

does not take away the natural obligation, *F. 2. Feb. 1700, Hepburn*: But cautionry cannot subsist without some obligation to which it is accessory.

25. The cautioner, who binds himself at the desire of the principal debtor, has an *actio mandati*, or of relief against him, for recovering the principal and interest paid by himself to the creditor, and for damages; which action lies *de jure*, tho' the creditor should not assign to him on payment. Under damage, is not comprehended the loss sustained by the cautioner through his own fault, *e. g.* in suspending the debt without good grounds, or in allowing diligence to proceed upon it against his estate. As relief against the debtor is implied in fidejussory obligations, the cautioner, where such relief is cut off, is no longer bound: Hence, the defence of prescription frees the cautioner, as well as the principal debtor, *F. 19. Dec. 1695, Doul*: Thus, likewise, a cautioner is not bound, tho' the creditor should offer to prove by his oath, that he heard the debtor acknowledge the debt; because, as such oath could not prove against the debtor, the cautioner, if he were obliged to depose, would pay without relief, *Dalr. 17.*

26. But, 1. Where the cautionry is interposed to an obligation merely natural, the relief is restricted to the sums that have really turned to the debtor's profit. 2. A cautioner, who pays without citing the debtor, loses his relief, in so far as the debtor had a relevant defence against the debt, in whole or in part, *19. Dec. 1632, Maxwell*. Relief is not competent to the cautioner, till he either pays the debt, or

Relief is competent

is distressed for it; except, 1. Where the debtor is expressly bound to deliver to the cautioner his obligation cancelled, against a day certain, and has failed; or, 2. Where the debtor is *vergens ad inopiam*; in which case, the cautioner may, by proper diligence, secure the debtor's funds for his own relief, even before payment or distress.

Mutual relief among co-cautioners,

27. Mutual relief was not competent among the cautioners themselves, by the Roman law; for their obligations being separate, and having no mutual connection, payment made by any one of them to the creditor extinguished the obligation, unless the cautioner who paid had got a cession or assignment from the creditor, which he was entitled to demand, by the *beneficium cedendarum actionum*: But, by our law, a right of relief is competent *de jure* to the cautioner who pays, against his co-cautioners without either assignation, or even any clause of mutual relief in the bond; unless where the cautioner appears to have renounced it. In consequence of this implied relief, a creditor, if he shall grant a discharge to any one of the cautioners, must, in demanding the debt from the others, deduct that part, as to which he has cut off their relief, by that discharge. Where a cautioner in a bond, signs a bond of corroboration, as a principal obligant with the proper debtor, and with them a new cautioner, the cautioner in the new bond is entitled to a total relief against the first cautioner, at whose desire he is presumed to be bound, 10. *July 1745, Mirrie*. And this total relief against the first cautioner seems equitable, tho' he should not be a party to the bond of corroboration; for

Relief competent to cautioners in a corroboration.

for a corroborative security, in which he has no concern, ought not to advantage him, by throwing part of his cautionry obligation upon another, *Dalr.* 38. 60.

28. Cautionry is also judicial, as in a suspension. Cautioners of this kind got free, if either the charger or suspender died before discussing the suspension, till *Act S.* 29. *Jan.* 1650: And even after that act, their obligation ceased, if the decree suspended had been turned into a libel, *i. e.* sustained only as a libel through any informality; though the suspender should have been at last condemned in payment. This was altered by *Act S.* 27. *Dec.* 1709; but it is sufficient, at this day, to loose the cautioner, that, when he became bound, the suspender had good reason to suspend, *e. g.* if the charger had at that period no title, or had not then performed his part, though these grounds of suspension should be afterwards taken off. The clerk to the bills, whose duty it is to receive none but solvent cautioners, usually demanded for his security an attestation by one of a known character, of the solvency of the cautioner offered: These attesters must, by the last quoted act of *federunt*, bind themselves as cautioners for the cautioner in the suspension, and so are liable *subsidiarie*, in their order, after he is discussed*. In all maritime causes, where the parties are frequently foreigners, the defender must give caution *judicio fisci et judicatum solvi*: Such cautioner gets free by the death of the defender before sentence, 20. *Jan.* 1680, *Hodge*; but he continues bound, though the cause should be carried

Judicial
Caution-
ry.

Caution-
ers in a
suspension.

Caution-
ers *judicio*
fisci et ju-
dicatum
solvi.

* Cautioners in the loosing of an arrestment are not entitled to the benefit of discussion. *Kames Rem.* Dec. 49.

ried from the admiral to the court of session, 16. *Nov.* 1636, *Stewart*. This sort of caution is only to be exacted in causes strictly maritime, *New Coll.* 123.

Correi debendi.

29. It happens frequently, that a creditor takes two or more obligants bound to him, all as principal debtors, without fidejussion. Where they are so bound, for the performance of facts that are in themselves indivisible, they are liable, each for the whole, or *singuli in solidum*, *Dirl.* 166. But, if the obligation be for a sum of money, they are only liable *pro rata*; unless, 1. Where they are in express words bound conjunctly and severally; or, 2. In the case of bills or promissory notes, 13. *Nov.* 1746, *Elliot*. One of several obligants of this sort, who pays the whole debt, or fulfils the obligation, is entitled to a proportional relief against the rest; in such manner, that the loss must, in every case, fall equally upon all the solvent obligants.

Interest of money.

30. Obligations for sums of money are frequently accompanied with an obligation for the annual rent or interest thereof. Interest (*usurae*) is the profit due, by the debtor of a sum of money, to the creditor, for the use of it. The cannon law considered the taking of interest as unlawful, because money yields no natural fruits; but the law of Moses allowed it to be exacted from strangers, *Lev.* xxv. 36.—*Deut.* xxiii. 19. 20.; and all the reformed nations of Europe have found it necessary, after the example of the Romans, to authorise it at certain rates fixed by statute. Soon after the reformation, our legal interest was fixed at the rate of ten *per cent. per annum*, 1587, c. 52.; from

Rates of interest.

from which time, it has been gradually reduced, till at last, by 12. *Ann. Stat.* 2. c. 16. it was brought to five *per cent.* and has continued at that rate ever since.

31. Interest is due, either by law, or by ^{Interest} paction. It is due by law, either from the ^{due by} force of statute, under which may be included ^{law;} acts of federunt, or from the nature of the transaction. Bills of exchange, 1681, c. 20. and in-^{interest} land bills, 1696, c. 36. * tho' they should not be ^{upon} protested, K. 15. carry interest from their date ^{bills;} in case of not acceptance; or from the day of their falling due, in case of acceptance and not payment. Where a bill is accepted, which bears no term of payment, or which is payable on demand, no interest is due till demand be made of the sum, the legal voucher of which is a notorial protest. By 1621, c. 20. interest ^{upon de-} is due by a debtor after denunciation, for all ^{nuncia-} the sums contained in the diligence, even for ^{tion;} that part which is made up of interest. Sums, paid by cautioners on distrefs, carry interest, ^{upon sums} by *Act S.* 1. Feb. 1610, (see *Spotsf. Pr. p.* 34.) paid by not only as to the principal sum in the obli- ^{cautioner} gation, but as to the interest paid by the cau- ^{distressed.*} tioner. It was found to be sufficient distrefs, that the obligation was registered, tho' no charge of horning had been used thereupon against the cautioner, 24. Jan. 1527, *Wauch-* ton. Factors named by the court of Session are ^{Interest} liable for interest by a special act of federunt; ^{due by} see 2. 12. 23. ^{factors.}

32. It arises *ex lege*, or from the nature of ^{Interest of} the transaction, that a purchaser in a sale is li- ^{the price} able ^{of lands.}

* Vid. *Fountainhall*, July 28. 1705.

able in interest for the price of the lands bought from the term of his entry, tho' the price should be arrested in his hands, 17. Feb. 1624, *Dury*, or tho' the seller should not be able to deliver to him a sufficient progress, or title to the lands, 28. Jan. 1663, L. *Balnagown*; for no purchaser can in equity enjoy the fruits of the lands, while, at the same time, he retains the interest of the price: But lawful consignation of the price made by a purchaser, upon the refusal of the persons having right to receive it, stops the currency of interest. Where one intermeddles with money belonging to another which carries interest, he ought to restore it *cum omni obventionem et causa*, and is therefore liable in the interest of it, as being truly an accessory of the subject itself, 22. Dec. 1710, L. *Drum*,—18. Feb. 1736, *Erskine*. It is also from the nature of the transaction, that interest is in certain cases allowed to merchants or others, in name of damages, 13. Jan. 1737, *Aubray*; or *ex mora*, *New Coll.* 42. And the obligation upon tutors to employ the *nummi pupillares* upon interest after certain periods 1. 7. 12. may be derived from the same source.

Interest
due to
merchants
minors, or
others, *no-
mine dam-
ni*.

Interest
by express
paction;

33. Interest is due by express paction, where there is a clause in a bond or obligation, by which money is made to carry interest. An obligation is not lawful, where it is agreed on, that the yearly interest of the sum lent, if it should not be paid punctually as it falls due, shall be accumulated into a principal sum bearing interest; but an obligation may be lawfully granted, not only for the sum truly lent, but for the interest to the day at which the obligation is made payable, 1621, c. 28. whereby the intermediate interest

interest is accumulated into a principal sum, from the term of payment. Interest may be also due by implied paction: Thus, where interest upon a debt is, by a letter, promised for time past, such promise implies a paction for interest, as long as the debt remains unpaid; thus also, the use of payment of interest presumes a paction, *Dirl.* 408.; and, when interest is expressed for one term, it is presumed to be bargained for, till payment, 13. *Jan.* 1669, *Hume.*

34. The subject-matter of all obligations consists either of things, or of facts. Things exempted from commerce cannot be the subject of obligation, 2. 1. 2. *et seq.* One cannot be obliged to the performance of a fact naturally impossible; nor of a fact in itself immoral, for that is also, in the judgment of law, impossible, *l.* 15. *de cond inst.* Bargains relating to the succession of a person yet alive, were reprobated by the Roman law, as *contra bonos mores*, *l.* 61. *de V. O.*; but are allowed by our practice, *F.* 29. *July* 1708, *Rag.* Since impossible obligations are null, no penalty or damage can be incurred for non-performance; but it is otherwise, if the fact be in itself possible, tho' not in the debtor's power; in which case the rule obtains, *locum facti impræstabilis subit damnum et interesse.*

35. An obligation, to which a condition is adjoined, either naturally or morally impossible, is in the general case null; for the parties are presumed not to have been serious. But such obligation is valid, and the condition thereof held *pro non scripta*, 1. In testaments, 2. In obligations to the performance of which the granter lies under a natural tie, as in bonds of provision

or unfavourable.

Protestative conditions.

Implement in contracts must be mutual.

Donation;

when revokable.

Beneficium competentiae;

provision to a child. Where an obligation is granted under a condition, lawful but unfavourable, *e. g.* that the creditor shall not marry without the consent of certain friends, no more weight is given to the condition than the judge thinks reasonable, whether the obligant lay under a natural tie to oblige himself, *F. 20. July 1688, Pringle*, or not, *Hume, March 1682, Ford*. A condition, which is in some degree in the power of the creditor himself, is held as fulfilled, if he has done all he could to fulfil it, *l. 11. de cond. inst.* Implement or performance cannot be demanded in a mutual contract, by that party who himself declines, or cannot fulfil the counterpart; thus, a husband becoming bankrupt cannot demand, nor can any of his creditors affect, the wife's tocher, till her provisions contained in the marriage-articles be secured to her, *9. June 1738, cred. of Watson*.

36. Donation, so long as the subject is not delivered to the donee, may be justly ranked among obligations; and it is that obligation which arises from the mere good will and liberality of the granter. Donations imply no warranty, but from the future facts of the donor. They are hardly revokable by our law for ingratitude, tho' it should be of the grossest kind. Those betwixt man and wife are revokable by the donor, even after the death of the donee; but remuneratory grants, not being truly donations, cannot be so revoked, *1. 6. 18*. That special sort of donation, which is constituted verbally, is called a promise. 3. 2. 1. The Roman law entitled all donors to the *beneficium competentiae*, in virtue of which they might retain

tain such part of the donation as was necessary for their own subsistence. Our law allows this ^{to whom} benefit to fathers, with respect to the provi- ^{compe-} sions granted to their children, 21. Feb. 1745, ^{tent.} *Buntin*; and to grandfathers, which is a natural consequence of childrens obligation to aliment their indigent parents, but to no collateral relation, not even to brothers.

37. Donations, made in contemplation of *Donatio* death, or *mortis causa*, are of the nature of lega- ^{mortis} cies, and like them revokable. Consequently, ^{causa.} not being effectual in the granter's life, they cannot compete with any of his creditors; not even with those whose debts were contracted after the donation. They are understood to be given from a personal regard to the donee, and therefore fall by his predecease. No deed, after delivery, is to be presumed a *donatio mortis causa*; for revocation is excluded by delivery.

38. Deeds are not presumed, *in dubio*, to be Donation donations. Hence, a deed by a debtor to his ^{is not pre-} creditor, if donation be not expressed, is pre- ^{sumed in} fumed to be granted in security or satisfaction ^{dubio.} of the debt; but bonds of provision to children are, from the presumption of paternal affection, construed to be intended as an additional patrimony: Yet a tocher, given to a daughter in her marriage-contract, is presumed to be in satisfaction of all former bonds and debts, *P. Falc.* 107.; because marriage-contracts usually contain the whole provisions in favour of the bride. One who aliments a person that ^{In what} is come of age, without an express paction ^{cases is a-} for board, is presumed to have entertained ^{liment} him as a friend, unless in the case of those ^{presumed} who earn their living by the entertainment or ^{a dona-} tion.

board of strangers, *Br.* 106.: But alimony given to minors, who cannot bargain for themselves, is not accounted a donation; except either where it is presumed from the near relation of the person alimenter, that it was given *ex pietate*; or where the minor had a father or curators, with whom a bargain might have been made, 21. July 1665, *L. Ludquhairn*,—11. June 1680, *Gordon contra Lesly*.

TIT. 4. *Of the Dissolution or Extinction of Obligations.*

Obligations are dissolved by implement, *e. g.* payment.

Indefinite payment.

Obligations may be dissolved by performance or implement, consent, compensation, novation, and confusion. 1. By specific performance: Thus, an obligation for a sum of money is extinguished by payment. The creditor is not obliged to accept of payment by parts, unless where the sum is payable by different divisions. If a debtor in two or more separate bonds to the same creditor had made an indefinite payment, without ascribing it, at the time, to any one of the obligations, the payment was, by the Roman law, to be applied by the creditor, as the debtor himself would have done, *l. 1. de solut.*; and, consequently, to that debt which bore hardest upon him, or to which a penalty was adjoined, *l. 3. 4. 5. eod. t.* By our law, which shows a more equal regard to the interest of the creditor and debtor, indefinite payments are applied, first, to interest, or to sums not bearing interest, *K. 5.*

2. To

2. To the sums that are least secured, if the debtor thereby incurs no rigorous penalty, *Jan. 1744. Paterson*. But, 3. If this application be penal on the debtor, *e. g.* by suffering the legal of an adjudication to expire, the payment will be so applied as to save the debtor from that forfeiture. Where one of the debts is secured by a cautioner, the other not, the application is to be so made, *caeteris paribus*, that both creditor and cautioner may have equal justice done to them, *K. 58*.

2. Payment made by the debtor upon a Payment mistake in fact, to one whom he believed, upon *bona fide*. probable grounds, to have the right of receiving payment, extinguishes the obligation; *e. g.* payment to one who had been the creditor's factor, but whose factory was recalled, without intimation to the debtor; or payment of rent by a tenant, to the landlord from whom he had the lease, tho' such landlord has been, before the payment, divested in favour of a singular successor: But payment made to one, to whom the law denies the power of receiving it, has not this effect; as if a debtor seized by letters of caption, should make payment to the messenger; for *ignorantia juris neminem excusat*. In all debts, the debtor, if he be not interpellated, may safely pay before the term, except in tack-duties or feu duties, the payment whereof, before the terms at which they are made payable, is construed to be collusive, in a question with a creditor of the landlord or superior, 28. Feb. 1628, *L. Lauchope*. Payment is in *dubio* presumed, by the voucher of the debt being in the hands of the debtor; *chirographum*,

phum, apud debitorem repertum, praesumitur solutum.

Extinction
of obliga-
tions by
the cre-
ditor's
consent.

Dischar-
ges of
written o-
bligations
must be in
writing;

but the
creditor's
intromis-
sion with
rents may
be proved
by witnes-
ses.

General
dischar-
ges.

3. Obligations are extinguishable by the consent of the creditor, who, without full implement, or even any implement, may renounce the right constituted in his own favour. Though a discharge or acquittance, granted by one whom the debtor *bona fide* took for the creditor, but who was not, extinguishes the obligation, if the satisfaction made by the debtor was real; yet, where it is imaginary, the discharge will not screen him from paying to the true creditor the debt that he had made no prior satisfaction for, *arg.* 14. *Dec.* 1661, *Humes*. In all debts which are constituted by writing, the extinction, whether it be by specific performance, or bare consent, must be proved, either by the oath of the creditor, or by a discharge in writing; and the same solemnities which law requires in the obligation are necessary in the discharge: But, where payment is made, not by the debtor himself, but by the creditor's intromission with the rents of the debtor's estate, or by delivery to him of goods in name of the debtor, such delivery or intromission, being *facti*, may be proved by witnesses, though the debt should have been not only constituted by writing, but made real on the debtor's lands by adjudication.

4. A discharge, though it should be general, of all that the granter can demand, extends not to debts of an uncommon kind, which are not presumed to have been under the granter's eye; as obligations of warrandice not yet incurred, or of relief of debts not yet paid to the creditor, 23. *Jan.* 1678, *Campbell*, or for performing spe-
cial

cial facts, 19. Nov. 1680, *Dalgerno*. A general clause subjoined to the discharge of a special debt, comprehends all debts of the same sort with that which is specially discharged, though they should be for greater sums, 29. June 1705, *Chappel*; but they do not extend to debts of a different sort, for the granter is presumed not to have had these in view. This doctrine applies also to general assignments. In annual payments, as of rents, feu duties, interest, &c. Consecutive discharges by the creditor, of the yearly or termly duties, presume the payment of all precedings. Two discharges by the ancestor, and the third by the heir, do not infer this presumption, if the heir was ignorant of the ancestor's discharges, *Dalr.* 21. And discharges by an administrator, as a factor, tutor, &c. presume only the payment of all preceding duties, incurred during his administration. This presumption arises from repeating the discharges thrice successively; and so does not hold in the case of two discharges, though they should include the duties of three or more terms.

5. Where the same person is both creditor and debtor to another, the mutual obligations, if they are for equal sums, are extinguished by compensation; if for unequal, still the lesser obligation is extinguished, and the greater diminished, as far as the concurrence of debt and credit goes. Compensation was not received with us, but by way of action, till 1592, *c.* 141. which first admitted compensation by way of exception. It had, by the *jus novum* of the Romans, its effect *ipso jure*, *l. ult. C. de compens.*; and consequently was drawn back to the period of concurrence, *ipso jure* by our law;

concourse, and had its operation from the necessity of law, without regard to the intendment of parties; but the chief effects given to it by our law begin from the period of pleading it in judgment. Hence, compensation was not sustained upon a debt prescribed at pleading it, tho' it was subsisting at the time of concurrence, K. 17. Hence also, one was allowed to plead compensation on that debt of the two that was worst secured, tho' the first concurrence was made by the other, 15. Nov. 1738, Sir W. Maxwell; See also *New Coll.* 85. Yet we have, from equity, given this effect to compensation, that it stops the currency of interest on both sides, downwards from the time of concurrence.

yet it stops
the cur-
rency of
interest.

Requisites
of com-
pensation.

The debts
must be of
the same
quality,

6. To found compensation, 1. Each of the parties must be debtor and creditor at the same time: A debtor, therefore, cannot plead compensation against his creditor's assignee, upon a debt due by the cedent, which the person compensating had not acquired, till the assignee's right was compleated by intimation. *Dirl.* 3. 2. Each of them must be debtor and creditor in his own right: Hence a tutor cannot compensate a debt properly due by himself, with a sum for which he is creditor *tutorio nomine*. 3. The mutual debts must be of the same quality: Hence, a sum of money cannot be compensated with a quantity of corns; because, till the prices are fixed at which the corns are to be converted into money, the two debts are incommensurable; hence also, a debt already payable, on which the creditor may have immediate execution, cannot, in strictness, be compensated with a debt, the term of payment whereof is not yet come. By a similar rule,

a moveable sum cannot be compensated with an heritable debt in the old form, bearing requisition; because, before requisition, the estate burdened is debtor, more properly than the proprietor, 12. Nov. 1675, *Hume*.

7. Lastly, compensation cannot be admitted ^{and clearly ascertained.} where the mutual debts are not clearly ascertained, either by a written obligation, the sentence of a judge, or the oath of a party. Where this requires but a short discussion, sentence for the pursuer is delayed for some time, *ex acquitate*, that the defender may make good his ground of compensation; according to the rule, *quod statim liquidari potest, pro jam liquido habetur*, 31. July 1707, *Macdoul*. Where a debt for fungibles is ascertained in money, by the sentence of a judge, the compensation can have no effect farther back than the liquidation, because, before sentence, the debts were incommensurable: But, where a debt for a sum of money is, in the course of a suit, constituted by the oath of the debtor, the compensation, after it is admitted by the judge, operates *retro*, in so far as concerns the currency of interest, to the time that, by the parties acknowledgement, the debt became due; for, in this case, the debtor's oath is not what creates the debt, or makes it liquid; it only declares that such a liquid sum was truly due before, 4. Dec. 1675, *Watson*. By the above quoted statute 1592, Compensation cannot be offered after decree, ^{sation is not admitted after decree:} either by way of suspension or reduction; but, if it is pleaded once, and unjustly repelled, it may be again insisted on, either by suspension or reduction. Decrees in absence are not decrees in the sense of this act, whether they are pronounced

pronounced by an inferior judge, 18. *June* 1662, *E. Marisbal*, or even by the court of Session, if they be afterwards turned into a libel; see 25. *July* 1676, *Wright*.

Reten-
tion.

What are
the ordi-
nary sub-
jects of re-
tention.

8. The right of retention, which bears a near resemblance to compensation, is chiefly competent, where the mutual debts, not being liquid, cannot be the ground of compensation and it is sometime admitted *ex aequitate*, in liquid debts, where compensation is excluded by statute: Thus, tho' compensation cannot be pleaded after decree, either against a creditor or his assigney, yet if the original creditor should become bankrupt, the debtor, even after decree, may retain against the assigney, till he gives security for satisfying the debtor's claim against the cedent, 18. *Feb.* 1736, *Maclarin*. This right is frequently founded in the expence disbursed, or work employed on the subject retained, and so arises from the mutual obligations incumbent on the parties; *e. g.* retention by a writer, of the writings belonging to his client, till payment of his account; or retention by a tradesman, of any piece of work, till payment of the sum expended on it, or the price of the workmanship. But retention may be sustained, tho' the debt due to him who claims it does not arise from the nature of the obligation by which he is debtor: Thus, a factor on a land estate may retain the sums levied by him in consequence of his factory, not only till he be paid of the disbursements made on occasion of such estate, but also till he be discharged from the separate engagements he may have entered into, on his constituent's account; and that, notwithstanding any diligence that may be used by the creditors

ditors of the constituent, to affect the balance due by the factor to the common debtor, *Nov. 1729, Stark.*

9. Obligations are dissolved by novation, whereby one obligation is changed into another, without changing either the debtor or creditor. The first obligation being thereby extinguished, the cautioners in it are loosed, and all its consequences discharged; so that the debtor remains bound only by the last. As a creditor to whom a right is once constituted, ought not to lose it by implication, novation is not easily presumed, and the new obligation is construed to be merely corroborative of the old; but, where the second obligation expressly bears to be *in satisfaction* of the first, these words must necessarily be explained into novation, 6. Dec. 1632, *Chisholm*. Where the creditor accepts of a new debtor, in place of the former who is discharged, this method of extinction is called delegation. Extinction by novation.
Novation is not presumed.

10. Obligations are extinguished *confusione*, where the debt and credit meet in the same person, either by succession or singular title, e. g. when the debtor succeeds to the creditor, or the creditor to the debtor, or a stranger to both, l. 21. § 1. *de liber. leg.*; for one cannot be debtor to himself. If he on whom the right of the creditor devolves, was only liable as cautioner, the accessory obligation is extinguished, because the debtor and creditor therein come to be the same person; but the principal obligation against the proper debtor subsists: And, by the same reason, tho' it be true that an heir is liable, *in suo ordine*, for his ancestor's moveable debts; yet a moveable debt, due to Extinction by delegation;
how far it takes place when the right devolves on the cautioner:

It does
not take
place in
debts pur-
chased by
the debt-
or's appa-
rent heir.

one who afterwards succeeds as heir to the debtor, is not extinguished *confusione*, but subsists against the executor, who is primarily liable in that sort of debts, 3. 9. 28. Debts or adjudications purchased by an apparent heir, affecting the estate of the ancestor, are not extinguished *confusione*; for the heir, while he is not entered, does not represent the debtor, nor fill his place: And tho' possession upon such rights, subjects him to a passive title, 3. 8. 39. yet that statutory penalty was enacted, merely in favour of creditors, but does not create a proper representation, nor annul the diligences so acquired, which theretore are effectual to singular successors, K. 102. If the succession, from which the *confusio* arises, happens afterwards to be divided, so as the debtor and creditor come again to be different persons, the *confusio* does not produce an extinction, but only a temporary suspension of the debt, St. 1. 18. 9.: Hence an assignation in favour of an heir of tailzie, and his heirs whatsoever, of a debt affecting the entailed estate, suspends the debt only during the life of such heir; but it may revive after his death, in the person of his heir at law, against the heir of tailzie.

T I T. 5. Of Assignations.

Rights are
transmit-
ted, either
by dispo-
sition,

Heritable rights, when they are clothed with investment, are transmitted by disposition, which is a writing containing procuratorship of resignation and precept of seisin; but those which

which either require no seisin, as servitudes, patronages, reversions, &c. or on which seisin has not actually followed, (as to which, see 2. 7. 13.), and also all moveable rights, are transmissible by simple assignation. He who grants the assignation, is called the cedent, and he who receives it, the assignee, or cessionary: If the assignee conveys his right to a third person, it is called a translation; and if he assigns it back to the cedent, a retrocession. Certain rights are, from the uses to which they are destined, incapable of transmission, as alimentary rights: Others cannot be assigned by the person vested in them without special powers given to him, as tacks, 2. 6. 13. reversions, 2. 8. 4. &c.: The transmission of a third sort is not presumed to be intended, without an express conveyance; as of paraphernal goods, which are so proper to the wife, that a general assignation by her to her husband, of all that did or should belong to her at her decease, does not comprehend them, *Dec. 1733, Paton*. A life interest is, by its nature, incapable of a proper transmission; but its profits may be assigned, while it subsists, 2. 9. 24.

2. Assignations must not only be delivered to the assignee, *Harc. 113*. but intimated by him to the debtor. Intimations have been probably first introduced, merely as an interpellation or prohibition to the debtor, that he should not pay to the original creditor: But they came afterwards to be considered as likewise necessary for completing the conveyance, 22. *Jan. 1663, Wallace*; inasmuch that, in a competition between two assignations, the last, if first intimated, is preferred. Hence, if we shall suppose

or assigna-
tion.

What
rights are
not assign-
able.

Intima-
tion of
assigna-
tions.

pose a debt assigned to one who has neglected to intimate his right during the cedent's life, any person who shall, upon the cedent's death, confirm the debt assigned, as executor creditor to the deceased, is preferable to such assigney.

What notification is equivalent to intimation.

Process or charge by the assigney to the debtor.

Possession by the assigney.

Registration of reversions in the proper record.

3. Tho' regularly, intimation to the debtor is made by an instrument, taken in the hands of a notary, by the assigney, or his procurator; yet the law admits equipollencies, where the notice of the assignment given to the debtor is equally strong. Thus, a charge upon letters of horning at the assigney's instance, or suit brought by him against the debtor, supplies the want of intimation; these being judicial acts, which expose the conveyance to the eyes both of the judge and of the debtor; or the debtor's promise of payment by writing to the assigney, because that is in effect a corroborating of the original debt. The assigney's possession of the right, by entering into payment of the rents or interest, is also equal to an intimation; for it imports, not only notice to the debtor, but his actual compliance: Thus, an assignation of a tack, or of the rents and profits of lands, is perfected by the assigney's possessing the ground, or levying the rents; and the assignation of a bond, by the debtor's payment of interest to the assigney. Assignations to assignable reversions are completed by their registration in the register of reversions, which was instituted for the special purpose of publishing such writes with their conveyances, *5. Dec. 1665, Beg*; but the registration of assignments of personal rights, as bonds, contracts, &c. does not supply the want of intimation; because, as to these, our records were not intended for publication, but merely for

for conservation and diligence. The debtor's private knowledge of the assignment is not sustained as intimation, 14. *March* 1626, L. *Westerraw*, since it imports neither publication nor possession, on the part of the assigney.

4. Certain conveyances need no intimation. In what cases notification is not necessary.

1. Indorsations of bills of exchange; for these are not to be fettered with forms, introduced by the laws of particular states.
2. Bank notes are fully conveyed by the bare delivery of them; for, as they are payable to the bearer, their property must pass with their possession.
3. Adjudication, which is a judicial conveyance, and marriage, which is a legal one, carry the full right of the subjects thereby conveyed, without intimation, *St.* 3. 1. 13. 14.; nevertheless, as there is nothing in these conveyances which can of themselves put the debtor *in mala fide*, he is therefore *in tuto* to pay to the wife, or to the original creditor in the debt adjudged, till the marriage or adjudication be notified to him. Assignments of moveable subjects, tho' they be intimated, if they are made *retenta possessione*, (the cedent retaining the possession), cannot hurt the cedent's creditors; for such rights are presumed, in all questions with creditors, to be collusive, and granted in trust for the cedent himself.

5. An assignation carries to the assigney the whole right of the subject conveyed, as it was in the cedent; and, consequently, he may use diligence, either in his cedent's name, while he is alive, or in his own: But letters of diligence, which have been issued in name of the cedent, cannot be executed by the messenger in the assigney's name; for messengers have no power to

Effects of assignation.

to judge of the import of transmissions, and are confined in their executions to the will of the letters, 11. *June 1745, Steuart.* Where a right is assigned simply in trust, the nature of the trust must determine the effects of the conveyance: If the declared purpose of the trust discovers an intention in the granter that the trustee shall have full power over the subject, he may use all acts of property; but if it is granted for a special purpose, *e. g.* to do diligence, the powers of the trustee, tho' not limited in the right, ought to go no farther.

The cedent's oath cannot hurt the assigney.

If the assignation be onerous.

6. After an assignation is intimated, the debtor cannot prove payment, or compensation, by the oath of the cedent, who has no longer any interest in the debt, unless the matter has been made litigious by an action commenced prior to the intimation: But the debtor may refer to the oath of the assigney, who is in the right of the debt, that the assignment was gratuitous, or in trust for the cedent; either of which being proved, the oath of the cedent will effect the assigney. If the assignation be in part onerous, and in part gratuitous, the cedent's oath is good against the assigney, only in so far as his right is gratuitous, 25. *Feb. 1679, Steil.* All defences competent against the original creditor in a moveable debt, which can be proved otherwise than by his oath, continue relevant against even an onerous assigney; whose right can be no better than that of his author, and must therefore remain affected with all the burdens which attended it in the author's persons. See this question discussed in the case of mutual contracts, *St. 1. 10. 16.* and in the case of personal rights of lands, *St. 3. 1. 21.*

TIT.

TIT. 6. *Of Arrestments and Poidings.*

THE diligences, whereby a creditor may affect his debtor's moveable subjects, are arrestment and poiding. By arrestment is Arrest- sometimes meant, the securing of a criminal's ment. person till trial, 1487, c. 99. ; but, as it is understood in the rubric of this title, it is the order of a judge, by which he who is debtor in a moveable obligation to the arrester's debtor, is prohibited to make payment or delivery, till the debt due to the arrester be paid or secured. The arrester's debtor is usually called the com- Common mon debtor ; because, where there are two or debtor. more competing creditors, he is debtor to all of them. The person in whose hands the diligence is used, is styled the arrestee.

2. Arrestment may be laid on by the autho- The war- rity, either of the supreme court, or of an in- rant of ar- ferior judge. In the first case, it proceeds ei- restment ; ther upon special letters of arrestment, or on a warrant contained in letters of horning ; and it must be executed by a messenger. The warrants, granted by interior judges, are called precepts of arrestment, and they are executed by the officer proper to the court. Where the in whose debtor to the common debtor is a pupil, arrest- hands it ment is properly used in the hands of the ru- may be tor, as the pupil's administrator : This doctrine used. may perhaps extend to other general administrators,

strators, as commissioners, &c. : But arrestment, used in the hands of a factor or steward, cannot found an action of forthcoming without calling the constituent, 18 Jan. 1709, *Donaldson*. Where the debtor to the common debtor is a corporation, arrestment must be used in the hands of the directors or treasurer, who represent the whole body, 10. Jan. 1739, creditors of *Menzies*. Arrestment, when it is used in the hands of the debtor himself, is inept; for that diligence is intended only as a restraint upon third parties.

upon what
debts it
may pro-
ceed.

Arrest-
ment up-
on a de-
pendence.

3. All debts, in which one is personally bound, though they should be heritably secured, are grounds upon which the creditor may arrest the moveable estate belonging to his debtor; for every creditor, whatever the nature of his debt may be, ought to have the whole of his debtor's estate subject to his diligence. Arrestment may proceed on a debt, the term of payment whereof is not yet come, in case the debtor be *vergens ad inopiam*, see 16. July 1678, Lord *Pitmedden*. If a debt be not yet constituted by decree or registration, the creditor may raise and execute a summons against his debtor for payment, on which pending action arrestment may be used, in the same manner as inhibition, 2. 11. 3. which is called arrestment upon a dependence. If one's ground of credit be for the performance of a fact, or if his depending process be merely declaratory, without a conclusion of payment or delivery, such claims are not admitted to be sufficient grounds for arrestment, *Darl.* 33.—26. Feb. 1712, *Koss*.

4. Move-

4. Moveable debts are the proper subjects of What arrestment; under which are comprehended debts are conditional debts, and even depending claims. arrestable. For lessening the expence of diligence to creditors, all bonds which have not been made properly heritably by feisin, are declared arrestable by 1644, c. 41. revived by 1661, c. 51.: But this act is limited to contracts and obligations; and does not extend to adjudications, wadsets, or other personal rights of lands, which are not properly debts, 22. Feb. 1666, *Lockhart*. Certain moveable debts are not arrestable: 1. Debts due by bill, which pass from hand to Neither hand as bags of money. 2. Future debts; for bills nor tho' inhibition extends to *adquirenda* as well as future *adquisita*, 2. 11. 4. yet arrestment is limited, by debts, its warrant, to the debt due at the time of serving it against the arrestee. Hence, an arrestment of rents or interests carries only those that have already either fallen due, or at least become current: As for such as had neither fallen due, nor become current at the date of the first arrestment, a new arrestment must be used, which may be done on the first warrant. Current rent, is that which has begun to run from the last term, but cannot be demanded till the next. Claims, depending on the issue of a suit, are not considered as future debts; for the sentence, when pronounced, has a retrospect to the period at which the claim was first founded, 19. Dec. 1744, *Wardrop*. The like doctrine nor ali-holds in conditional debts. 3. Alimentary debts mentary are not arrestable; for these are granted on debts are parental considerations, and so are not communicable to creditors, 19. Dec. 1738, creditors of *Douglas*; but the past interest due upon such

such debt may be arrested by the person who has furnished the alimony. One cannot secure his own effects to himself for his maintenance, so as they shall not be affectable by his creditors. Salaries annexed to offices granted by the King, and particularly those granted to the judges of the session, *Spotif. Pr. v. Pension*,—*Act S. 27. Feb. 1662*, and the fees of servants, are considered as alimentary funds; but the surplus fee, over and above what is necessary for the servants personal uses, may be arrested, *9. July 1668, Beg.*

The yearly profits may be arrested, where the right itself cannot.

5. In obligations which carry a yearly right to the creditor, if the obligation itself be arrestable, *e. g.* a moveable bond, or an heritable one not clothed with seisin, the principal sum is carried by the arrestment, as well as the past interest; and consequently, all the future interests until payment, as accessory to the right itself: But in rights of lands, or in heritable bonds perfected by seisin, no more can be arrested than the rents or interests that had either fallen due, or become current, at laying on the arrestment. In the same manner, the arrestment of a bond due to a wife, used by a creditor of the husband, carries only the past and current interest; for the right itself does not fall under the *jus mariti*, *19. Jan. 1739, cred. of Clunes.*

Effect of breach of arrestment.

6. If, in contempt of the arrestment, the arrestee shall make payment of the sum, or deliver the goods arrested, to the common debtor, he is not only liable criminally for breach of arrestment, but he must pay the debt again to the arrester. Nay, in the case of arrestment used at the market-cross of Edinburgh, and pier and

and shore of Leith, against a person abroad upon the public service, payment by the arrestee to his creditor, after the date of the arrestment, makes him liable in second payment to the arrester; because the arrester had done all in his power to notify his diligence,

F. 22. July 1701, Blackwood. Arrestment

is not merely prohibitory, as inhibitions are, but is a step of diligence which founds the user in a subsequent action, whereby the property of the subject arrested may be adjudged to him;

It, therefore, does not, by our later practice, Arrestment does fall by the death of the arrestee, but continues to subsist, as a foundation for an action of not fall by the arrestee's forthcoming against his heir, while the subject arrested remains *in medio*, 21. Dec. 1738, E. death.

Aberdeen. Far less is arrestment lost, either by the death of the arrester, or of the common debtor.

7. Where arrestment proceeds on a depend- Loosing ing action, it may be loosed by the common of arrest- debtor's giving security to the arrester for his ment.

debt, in the event it shall be found due. By the ancient practice, the receiving of this caution was committed entirely to the messenger, whose certificate that caution was given effectually loosed the arrestment: But all bonds of caution in loosings are now to be received by the clerk to the bills, and recorded in the

books of Session, 1617, c. 17. Arrestment Loosing not admitted but founded on decrees, or on registered obligations, on payment or consignation; except, 1. Where the term of payment of the debt is not yet come, or the consignation has not yet existed. 2. Where the arrestment

Excep-
tions.

Effect of
loosing.

Forthco-
ming on
arrest-
ment ;

before
whom can
it be pur-
sued.

The ar-
rester's
debt must
be first li-
quidated.

ment has proceeded on a registered contract, in which the debts or mutual obligations are not liquid, 31. *July 1705, Macfarlane.* 3. Where the decree is suspended, or turned into a libel; for, till the suspension be discussed, or the pending action concluded, it cannot be known whether any debt be truly due. A loosing takes off the *nexus* which had been laid on the subject arrested; so that the arrestee may thereafter pay safely to his creditor, and the cautioner substituted in place of the arrestment, for the arrester's security: Yet the arrester may, while the subject continues with the arrestee, pursue him in a forthcoming, notwithstanding the loosing, 7. *Feb. 1665, Graham.*

8. Arrestment is only an inchoated or begun diligence; to perfect it, there must be an action brought by the arrester against the arrestee, to make the debt or subject arrested forthcoming. In this action, the common debtor must be called for his interest, that he may have an opportunity of excepting to the lawfulness or extent of the debt on which the diligence proceeded. Though an arrestment cannot be executed without the territory of the judge who granted the precept, 1. 2. 1. yet one inferior judge is competent to a forthcoming, upon an arrestment laid on by the warrant of another, *St. 3. 1. 24—23. June 1710, Dalrymple.* Before a forthcoming can be pursued, the debt due by the common debtor to the arrester must be liquidated; for the arrester can be no further entitled to the subject arrested than to the extent of the debt due to him by the common debtor. If the pursuer cannot prove the debt due by the arrestee *scripto*,
he

he must refer it to his oath. Where the subject arrested is a sum of money, it is, by the decree of forthcoming, directed to be paid to the pursuer towards satisfying his debts; where goods are arrested, the judge ordains them to be exposed to sale, and the price to be delivered to the pursuer, 12. Nov. 1680, *Stevensons*: So that, in either case, decrees of forthcoming are judicial assignments to the arrester, of the subject arrested.

9. In all competitions, regard is had to the dates, not of the grounds of debt, but of the diligences proceeding upon them. In the competition of arrestments, the preference is governed by their dates, according to the priority, even of hours, where it appears with any certainty which is the first. But, as arrestment is but a begun diligence, therefore, if a prior arrester shall neglect to insist in an action of forthcoming for such a time as may be reasonably construed into a desertion of his begun diligence, he loses that preference which it was in his power to have obtained for himself, and the last arrester is preferred. But, as dereliction of diligence is not easily presumed, the distance of above two years, between the first arrestment and the decree of forthcoming, was found, not to make such a *mora*, as to entitle the posterior arrester to a preference, Jan. 1724. *Nairn*. This rule of preference, according to the dates of the several arrestments, holds, by our present practice, whether they have proceeded on a decree, or on a dependence; on debts not yet payable, or on debts already payable; provided the pendency shall have been closed, or the debt have become payable,

Decree of forthcoming is really an assignment.

Arrestments are preferred by their dates,

provided the arrester insists in his forthcoming.

able, before the issue of the competition, 14. June 1710, *Brody*.—K. 100.

Rules of
preference
between
arresters
and assign-
neys.

10. In the competition of arrestments with assignations, an assignation by the common debtor, intimated before arrestment, is preferable to the arrestment; for, by the intimated assignation, the debtor is fully divested, after which the subject cannot be arrested as his. If the assignation is granted before arrestment, but not intimated till after it, the arrester is preferred; for arrestment renders the subject litigious, and so excludes every voluntary right of the debtor, either granted after the diligence, or not completed till after it. From these rules, a third necessarily follows, that, if the intimation and arrestment are of equal dates, they are preferable *pari passu*; unless the arrester has deserted his diligence, by neglecting for a reasonable time to obtain a forthcoming.

Poin ding;

its war-
rant.

A previ-
ous
charge
must be
given,

except in
poin dings
for teu-

11. Poin ding is that diligence, affecting moveable subjects, by which their property is carried directly to the creditor. Real poin ding, which proceeds on real debts, or *debita fundi*, is treated of below, 4. 1. 3. Personal poin ding may have for its warrant either letters of horn ing, containing a clause for poin ding, and then it is executed by messengers; or precepts of poin ding, granted by sheriffs, commissaries, &c. which are executed by their proper officers. No poin ding can proceed, till a charge be given to the debtor to pay or perform, and the days thereof be expired, by 1669, c. 4. except poin dings against vassals for their feu duties, and poin dings against tenants for rent, proceeding upon the landlord's own decree; in which the ancient custom of poin ding with-
out

out a previous charge continues, 18. *Dec.* duties or
 1735, *Macqueen*. A debtor's goods may be rents.
 poined by one creditor, tho' they have been
 arrested before, by another; for arrestment be-
 ing but an imperfect diligence, leaves the right Arrest-
 of the subject still in the debtor, and so cannot ment is no
 hinder any creditor from using a more perfect bar to
 diligence, which has the effect of carrying the poining.
 property directly to himself.

12. It is only goods belonging to the debtor, What
 that can be poined. Anciently, the tenant's subjects
 goods might be poined for his landlord's debt, may be
 either real or personal, to the full extent of the poined.
 debt, even tho' the tenant had not been in ar-
 rear of rent; but now, of a long time, prob-
 ably from a favourable interpretation of act
 1469, c 37. no poining has proceeded against
 a tenant, even to the least extent, for his land-
 lord's personal debt. No cattle pertaining to
 the plough, nor instruments of tillage, could, No
 by the Roman law, *l. 7. 8. C. quae res pign.* plough-
obl. be impignorated for debt, or carried off by goods
 the diligence of creditors; nor can they be poined
 poined by ours, in the time of labouring or till- in the
 ing the ground, unless where the debtor has time of
 no other goods that may be poined, 1503, labour.
 c. 98. By labouring-time is understood, that
 time, in which that tenant, whose goods are to
 be poined, is ploughing, though he should have
 been earlier or later than his neighbours,
 20. *June 1712, Arnot*; but summer-fallowing
 does not fall under the act 22. *Nov. 1628, Wat-*
son. Tho' the statute prohibits such poining,
 not only where the debtor has moveables, but
 even where he has lands, that may be apprifed,
 this

this last part of the alternative has gone into disuse, *F. 7. Dec. 1692, Turner.*

The form
of poind
ing.

the goods
must be
twice ap
prised.

13. In the execution of poinding, the debtor's goods must be apprised, first, on the ground of the lands where they are laid hold on, and a second time at the market cross of the jurisdiction, by the stated apprisers thereof; or, if there are none, by persons named by the messenger or other officer employed in the diligence. Next, the messenger must, after public intimation by three oyesles, declare the value of the goods according to the second apprisement, and require the debtor to make payment of the debt, including interest and expences. If payment shall be offered to the creditor, or in his absence to his lawful attorney; or if, in case of refusal by them, consignation of the debt shall be made in the hands of the judge-ordinary, or his clerk, the goods must be left with the debtor; if not, the messenger ought to adjudge and deliver them over, at the apprised value, to the use of the diligence, towards his payment: And the debtor is entitled to a copy of the warrant and executions, as a voucher that the debt is discharged, in whole or in part, by the goods poinded.

Ministers
and heri-
tors may
poind on
one appre-
tiation.

Appretia-
tion at the
market-
cross of an

14. Ministers may, by 1663, *c. 21.* poind for their stipends, upon one apprisement on the ground of the lands; and landlords were always in use to poind so for their rents, *Balfour, p. 40. c. 10.—18. Dec. 1735, Macqueen.* By the late jurisdiction act, 20. *Geo. II.* the apprisement of the goods at the market cross of the next royal borough, or even of the next head-borough of stewarty or regality, though these jurisdictions be abolished, is declared as

sufficient

sufficient as if they were carried to the head-borough of the shire. Poining, whether it be considered as a sentence, or as the execution of a sentence, must be proceeded in between sun-rising and sun-setting; or, at least, it must be finished before the going off of day-light, 11. Feb. 1675, *Douglas*; see F. 10. Nov. 1703, *Gordon*.

The powers of the officer employed in the execution of poinings, are not clearly defined by custom, in the case of a third party claiming the property of the goods to be pointed. This is certain, that he may take the oath of the claimant upon the verity of his claim; and if from thence it shall appear that the claimant's title is collusive, he ought to proceed in the diligence; but, if there remains the least doubt, his safest course is to deliver the goods to the claimant, and to express in his execution the reasons why poining did not proceed.

15. As law has required certain solemnities in poining, without which the property of the goods cannot be transferred to the creditor; therefore, if a messenger should be interrupted, before completing the poining, by any fatality, or force not imputable to a co-creditor, such incomplete poining cannot hurt the diligence of that co-creditor: But where a poining was forcibly stopped by the possessor of the goods, on pretence that they had been already arrested in his hands by another, it was considered as completed in a question with the prior arrester, 13. Feb. 1736, *Corry*; probably from a presumption, that the arrester, whose diligence was used as a handle for stopping the messenger, had been privy to the deforcement.

X x

The

Deforcement of the mesfenger.

The person himself who stops a pointing *via facti*, on groundless pretences, is liable, both criminally, in the pains of deforcement, 4. 4. 34. and civilly, in the value of the goods which might have been pointed by the creditor.

TIT. 7. Of Prescriptions.

Prescription.

Prescription, which is a method, both of establishing, and of extinguishing property, is either positive or negative. Positive prescription is generally defined, as the Roman *usucapio*, the acquisition of property (it should rather be, when applied to our law, the securing it against all further challenge) by the possessor's continuing his possession for the time which law has declared sufficient for that purpose: Negative, is the loss or amission of a right, by neglecting to follow it forth, or use it, during the whole time limited by law. The doctrine of prescription, which is, by some writers, condemned, as contrary to justice, has been introduced, that the claims of negligent creditors might not subsist for ever, that property might be at last fixed, and forgeries discouraged, which the difficulty of detecting must have made exceeding frequent, if no length of time had limited the legal effect of writings.

Positive prescription;

2. Positive prescription was first introduced into our law, by 1617, c. 12. which enacts, that whoever shall have possessed his lands, annualrents, or other heritages, peaceably, in virtue of infeftments, for forty years continually after

after their dates, shall not thereafter be disquieted in his right by any person pretending a better title. Under *heritages* are comprehended fairs or markets, and every other right that is *fundo annexum*, and capable of continual possession. Continued possession, if proved as far back as the memory of man, presumes possession upwards to the date of the infeftment. The whole course of possession must, by the act, be founded on seifins, and, consequently, no part thereof on the bare right of apparency, 15. Feb. 1671, E. Argyll; but forty years possession, without seifin, is sufficient in the prescription of such heritable rights as do not require seifin. The possession must also be without any *lawful* interruption; *i. e.* it must neither be interrupted *via facti* nor *via juris*. The prescription of subjects not expressed in the infeftment, as part and pertinent of another subject, especially expressed, has been explained, 2. 6. 6.

3. The act requires, that the possessor produce, as his title of prescription, a charter of the lands, preceding the forty years possession, with the seifin following on it; and where there is no charter extant, seifins, one or more, standing together for forty years, and proceeding either on retours, or precepts of *clare constat*. This has given rise to a reasonable distinction observed in practice, between the prescription of a singular successor, and of an heir. Singular successors must produce for their title of prescription, not only a seifin, but its warrant, as a charter, disposition, &c. either in their own person, or in that of their author: But the production by an heir of seifins, one or more

Singular
successors
must pro-
duce both
and seifin.

An heir more standing together for forty years, and need produce only *stat*, is sufficient. The heir is not obliged to produce the retours, or precepts, on which his feifins proceed, *Nov. 9. 1739. Purdy*; nor is the singular fucceffor obliged to produce the ground of his charter, 1741, *Ged*; fo that, if the title of prefcription produced be a fair deed, and a fufficient title of property, the poffeffor is fecure by the act, which admits no ground of challenge, but falfehood. A fpecial ftatute, for eftablifhing the pofitive prefcription in moveable rights, was not neceffary; for, fince a title in writing is not requifite for the acquiring of thefe, the negative prefcription, by which all right of action for recovering the property is cut off, effectually fecures the poffeffor.

Negative
prefcription.

4. The negative prefcription of obligations, by the lapfe of forty years, was introduced into our law long before the pofitive, by 1469, *c. 29.*—1474, *c. 55.* This prefcription is now amplified by the forefaid act 1617, which has extended it to all actions competent upon heritable bonds, reverfions, and others whatfoever; unlefs where the reverfions are either incorporated in the body of the wadfet-right, or registered in the register of reverfions: And reverfions fo incorporated, or registered, are not only exempted from the negative prefcription, but they are an effectual bar againft any perfon from pleading the pofitive, *K. 92.*

Shorter
negative
prefcriptions.

5. A fhorter negative prefcription is introduced by ftatute, in certain rights and debts. Actions of fpuilzie, ejection, and others of that nature, mult be purfued within three years after

ter the commission of the fact on which the action is founded, by 1579, c. 81. As in spuilzies and ejections, the pursuer was entitled, *in odium* of violence, to a proof by his own oath *in litem*, and to the violent profits against the defender, that statute meant only to limit these special privileges by a three year's prescription, without cutting off the right of action, where the claim is restricted to simple restitution, 16. *March 1627, Hay.* Under the general words, *and others of that nature*, are comprehended all actions, where the pursuer is admitted to prove his libel by his own oath *in litem*.

Prescription of spuilzie and ejection.

6. Servants fees, house rents, men's ordinaries, (*i. e.* money due for board), and merchants accounts, fall under the triennial prescription, by 1579, c. 83. There is also a general clause subjoined to this statute, of *other the like debts*, which includes alimentary debts, *Br. MS. 25. July 1716, Hamilton*, wages due to workmen, *F. 21. Dec. 1692, Bayne*, and accounts due to writers, agents, or procurators, 16. *Dec. 1675, Somervel.* These debts may, by this act, be proved after the three years, either by the writing or oath of the debtor: so that they prescribe only as to the mean of proof by witnesses; but, after the three years, it behoves the creditor to refer to the debtor's oath, not only the constitution, but the subsistence of the debt, *Harc. 764.*; for the debtor's oath, that a debt once existed, unless it contains also an acknowledgement that it is still due, cannot be said to prove the debt in the terms of the statute. In the prescription of house-rents, servants fees, and alimony, each term of rent, fee, or alimony, runs a separate course of

Prescription of servants fees, house rents, and merchants accounts.

The period from which these prescriptions commence.

of prescription; so that, in an action for these, the claim will be restricted to the arrears incurred within the three years immediately before the citation, 12. *Feb.* 1680, *Rosf.*—14. *Jan.* 1737, *Ferguson*: But, in accounts, prescription does not begin till the last article; for a single article cannot be called an account, 16. *Dec.* 1675, *Somervell*. The currency of an account, the first part of which was furnished to a person deceased, is preserved in a question with the heir, by new furnishings within the three years to that heir; because *heres est eadem persona cum defuncto*, 26. *Feb.* 1670, *Graham*. Actions of removing must also be pursued within three years after the warning, by 1579, *c.* 82.

Prescription of removing.

Prescription of retours and processses of error.

7. Reductions of erroneous retours, and actions of error against the inquest, did prescribe, if not pursued, within three years after the service, by 1494, *c.* 57.; which term is lengthened to twenty years, as to the reduction of retours by 1617, *c.* 13. This last has the appearance of a declaratory statute, as if the former had only meant to save the inquest from processses of error, and not to cut off the right of reduction, by the triennial prescription; but it does both in express words: And therefore the last act contains a special clause, that those who had, before the date of it, acquired right to lands, from persons retoured thereto, shall enjoy their rights, as the law then stood. It statutes in general, that all erroneous retours shall be free from challenge after twenty years; and so is not to be confined, as Sir Geo. Mackenzie conjectures, in his observations upon it, to the competition of different kinds of heirs between themselves,

themselves, *e. g.* between an heir of line, and an heir of tailzie.

8. Ministers stipends and multures prescribe in five years after they are due; and arrears of rent (or mails and duties) five years after the tenant's removing from the lands, by 1669, *c.*

Prescription of ministers stipends, multures, and arrears of rent;

9. Stipends due during a vacancy, though they are not included in the strict letter of this act, have been found to fall under the spirit of it, *New Coll.* 77.; because the favour of the debtor is equally strong in both. As the prescription of mails and duties was introduced in favour of poor tenants, that they might not suffer by neglecting to preserve their discharges, a proprietor of lands subject to a life-rent, who had obtained a lease of all the life-rented lands from the liferenter, is not entitled to plead it, 9. *Dec.* 1709, *Murray*; nor a tackfman of one's whole estate, who had, by the lease, a power of removing tenants, 20.

July 1733, *L. Carfin*. By the same statute, of bargains concerning moveables, or sums of money which are proveable by witnesses, prescribe in five years after the bargain. Under these are included sales, locations, and all other consensual contracts, to the constitution of which writing is not necessary. But all the above mentioned debts contained in this statute may, after the five years, be proved, either by the oath or the writing of the debtor; of which above,

of bargains of moveables;

§ 6. By this act also, a quinquennial prescription is established in arrestments, whether on decrees or depending actions: The first prescribe in five years after using the arrestment, and the last, in five years after sentence is pronounced on the depending action.

and of arrestments.

9. No

Limita-
tion of
cautionry
engage-
ments.

It is strict-
ly inter-
preted.

Prescrip-
tion of tu-
tory ac-
counts.

Prescrip-
tion of
holograph
writings.

9. No person binding for or with another, either as cautioner or co-principal, in a bond or contract for a sum of money, continues bound after seven years from the date of the bond, provided he has either a clause of relief in the bond, or a separate bond of relief, intimated to the creditor, at his receiving the bond, 1695, *c.* 5. But the act declares, that all diligence used within the seven years against the cautioner, shall stand good. As this is a public law, intended to prevent the bad consequences of rash engagements, its benefit cannot, before the lapse of the seven years, be renounced by the cautioner, *Edg.* 19 *Feb.* 1724, *Norie*. As it is correctory, it is strictly interpreted: Thus, bonds, bearing a mutual clause of relief *pro rata* fall not under it, 21. *Jan.* 1708, *Ballantyne*; nor bonds of corroboration, *Br.* 61.—15. *Dec.* 1747, *Lady Henr. Gordon*; nor obligations, where the conditions is not purified, or the term of payment not come within the seven years; because no diligence can be used on these, *Br.* 54. The statutes excludes all cautionries for the faithful discharge of offices; these not being obligations in a bond, or contract for sums of money. And practice has denied the benefit of it to all judicial cautioners, as cautioners in a suspension. Actions of count and reckoning, competent either to minors against their tutors or curators, or *vice versa*, prescribe, by 1696, *c.* 9. in ten years, after the majority or death of the minor.

10. By the before cited 1669, *c.* 9. holograph bonds, missive letters, and books of account, not attested by witnesses, prescribe in twenty years, unless the creditor shall thereaf-
ter

ter prove the verity of the subscription by the debtor's oath. It is therefore sufficient to save from the effect of this prescription, that the constitution of the debt be proved by the party's oath, after the twenty years; whereas in stipends, merchants accounts, &c. not only the constitution, but the subsistence of the debt, must be proved by writing or the debtor's oath, after the term of prescription. Some lawyers extend this prescription of holograph writings to all obligations for sums not exceeding L. 100 Scots, which are not attested by witnesses; because, tho' these are in practice sustained, notwithstanding the act 1540, c. 117. yet they ought not to have the same duration with deeds attested by witnesses. Tho' in the short prescriptions of debts, the right of action is for ever lost, if not exercised within the time limited, yet, where action was brought on any of those debts, before the prescription was run, it subsisted, like any other right, for forty years. As this defeated the purpose of the acts establishing these prescriptions, all processes upon warnings, spuilzies, ejections, or arrestments, or for payment of the debts contained in act 1669, c. 9. are, by the said act, joined with 1685, c. 14. declared to prescribe in five years, if not wakened within that time; see 4. 1. 33.

11. Certain obligations are lost by the lapse of Extinction of obligations by taciturnity.
 less than forty years without the aid of statute; where the nature of the obligation, and the circumstances of parties, justify it: Thus, bills which are not intended for lasting securities, produce no action, where the creditor has been long silent, unless the subsistence of the debt be proved

proved by the debtor's oath; but the precise time is not fixed by practice; see *Falc. vol. 2. 48.*—*New Coll. 2. 65.** Thus also, a receipt for bills granted by a writer to his employer, not insisted upon for twenty three years, was found not productive of an action, *Falc. vol. 2. 74.* The prescriptions of the restitution of minors, of the benefit of inventory, &c. are explained in their proper places.

Bona fides presumed in the positive prescription;

It is not required in the long negative prescription.

Prescription runs *de momento in momentum.*

The positive prescription runs a-

12. In the positive prescription, as established by the act 1617, the continued possession for forty years, proceeding upon a title of property not chargeable with falsehood, secures the possessor against all other grounds of challenge, and so presumes *bona fides, presumptione juris et de jure*, 27. Nov. 1677, *Grant.* In the long negative prescription, *bona fides* in the debtor is not required: The creditor's neglecting to insist for so long a time, is construed as an abandoning of his debt, and so is equivalent to a discharge. Hence, though the subsistence of the debt should be referred to the debtor's own oath, after the forty years, he is not liable *F. 7. Dec. 1703, Napier.*

13. Prescription runs *de momento in momentum*: The whole time defined by law must be compleated, before a right can be either acquired or lost by it; so that interruption made on the last day of the fortieth year breaks its course. Civil possession, 2. 1. 12. has the same effects with natural, in all questions of prescription, whether positive or negative. The positive prescription runs against the Sovereign himself, by the express words of the act 1617, even

* The duration of bills is now limited to six years, by 12. Geo. 3. c. and subsequent statute 23. Geo. 3. c. 18.

even as to his annexed property, 1633, c. 12.; gainst the but it is generally thought he cannot suffer by King. the negative: He is secured against the negligence of his officers, in the management of processess, by express statute, 1600, c. 14. The Both pre-negative, as well as the positive prescription, run a- runs against communities and hospitals, though gainst their overseers are administrators only, and not commu- proprietors; and against the church, though nities, and churchmen have but a temporary interest in against the church. their benefices. But, because the rights of beneficiaries to their stipends are liable to accidents, thro' the frequent change of incumbents, *Decennalis et triennalis possessio*. thirteen years possession does, by a rule of the Roman chancery which we have adopted, found a presumptive title in the beneficiary; *decennalis et triennalis possessor non tenetur docere de titulo*: But this is not properly prescription; for if, by titles recovered, perhaps out of the incumbent's own hands, it shall appear that he has possessed tithes, or other subjects, to a greater extent than he ought, his possession will be restricted accordingly, 23. July 1708, Rule. This right must not be confounded with Prescrip- that established in favour of churchmen, by tion of *Act S. 16. Dec. 1612,—2. 9. 17.* which is con- church- fined to church-lands and rents, and seems to lands and constitute a proper prescription, upon a posses- rents. sion of thirty years.

14. The clause in the act 1617, saving mi- Does pre- nors from prescription, is extended to the po- scription sitive as well as to the negative prescription, run a- *New Coll. 118.*; but the exception of minority gainst is not admitted in the case of hospitals for chil- minors? dren, where there is a continual succession of minors, that being a *casus insolitus*, F. 17. Dec. 1695,

1695, *Heriot's hospital*. Minors are expressly excepted in several of the short prescriptions, as 1579, c. 81.—1669, c. 9.; but, where law leaves them in the common case, they must be subject to the common rules.

it does not run *contra non valentem agere*; 15. Prescription does not run *contra non valentem agere*, against one who is barred, by some legal incapacity, from pursuing, 25. *Jan.* 1678,

D. Lauderdale; for, in such case, neither negligence, nor dereliction, can be imputed to him. This rule is, by a favourable interpretation, extended to wives, who, *ex reverentia maritali*, forbear to pursue actions competent to them against their husbands, 5. *July* 1665, *Macky*; but every prescription runs against wives, in

it does not commence till the debt can be sued for; favour of third parties. On the same ground, tho', by the act 1617, prescription is said to commence from the date of the obligation, with the single exception of actions of warrandice,

yet the words of that, and other such statutes, are so explained, or rather corrected, into an agreeableness with this rule, that the prescription runs only from the time that the debt or right could be sued upon. Thus, inhibition prescribes only from the publishing of the deed granted to the inhibitor's prejudice, *P. Falc.* 32.: And, in the prescription of removings, the years are computed only from the term at which the defender is warned to remove, 6. *Feb.* 1629. *L. Borthwick*, tho' the act 1579, c. 82. warrents the commencement of them from

it does not the date of the warning. Neither can prescription run against persons who are already in possession, and so can gain nothing by a purchase. Thus, where a person, who has two adjacent lands, is in possession of one, and the other is in possession of another, the prescription runs against the latter, and not against the former.

possession

session upon one of them, prescription cannot run against the other, during such possession; see 26. Nov. 1728, *Frazer*.

16. Certain rights are incapable of prescription: 1. Things that law has exempted from commerce, 2. 1. 2. Of this sort were tithes, which being wholly appropriated, before the Reformation, to sacred uses, could not be made the property of private persons: But now they are *juris privati*, except in so far as they are actually destined for the maintenance of the clergy; and consequently are capable of the positive prescription, tho' they cannot be lost by the negative, see § 17. Things stolen or possessed by violence were so far *extra commercium* by the Roman law, that they could not be acquired by usucapion, even in the person of a *bona fide* possessor; but this, and all other grounds of challenge, seem to have been cut off by the *praescriptio longissimi temporis*, l. 3. 4. *C. de praescr.* 30. vel 40. ann.; neither does our statute of prescription make any exception in the case of stolen goods. 2. *Res merae facultatis*, e. g. a faculty to charge a subject with debts, to revoke, &c. cannot be lost by prescription, 14. March 1707, *L. Bimmer-side*; for faculties may, by their nature, be exercised at any time: Hence, a proprietor's right of using any act of property on his own grounds, cannot be lost by the greatest length of time, tho' a neighbouring heritor should happen to be hurt by the exercise of it, 2. 9. 10. 3. Exceptions competent to a person for eliding an action, cannot prescribe, if they are founded on simple discharges; because discharges are intended to have no further operation, and cannot produce an

Res extra commercium cannot be acquired by prescription;

but things stolen may.

Faculties cannot be lost by prescription;

nor exceptions,

an action, whereby the prescription may be interrupted : But, where the exception is founded on a right productive of an action, *e. g.* compensation, such right must be insisted on, within the years of prescription, 3. 4. 5.

4. Obligations of yearly pensions or payments, tho' no demand has been made on them for forty years, do not suffer a total prescription, but still subsist as to the arrears fallen due within that period, *l. 7. § 6. de praescr. 30. vel 40. ann.*—*July 1730, Lockhart* ; because prescription cannot run against an obligation, till it be payable, and each year's pension or payment is considered as a separate debt. But in bonds which carry a yearly interest, since the obligation is but one, and can be fulfilled at once, the interest is merely an accessory to the principal sum ; and, therefore, if the creditor has been silent for forty years, the obligation itself is prescribed, and, consequently, all the interests as accessories.

nor the
right of
blood.

17. No right can be lost *non utendo* by one, unless the effect of that prescription be to establish it in another. Hence the rule arises, *juri sanguinis nunquam praescribitur* : One may, therefore, at the greatest distance from his ancestor's death, serve heir to him, if no other has served before him ; for as that right is proper to him who has the character of heir, there can be no interest vested in any other person to found an opposition. Hence, also, a proprietor of lands cannot lose his property by the negative prescription, unless he who objects it can himself plead the positive, in terms of the act 1617, *Edg. 20. July 1725, Paion*. On the same ground, a superiors right of feu-duties cannot

The ne-
gative
prescrip-
tion in
heritage.

Feu-du-
ties cannot

cannot be lost *non utendo*; because, being inherent in the superiority, it is truly a right of the lands, that cannot suffer the negative prescription, except in favour of one who can plead the positive; which the vassal cannot do, being destitute of a title. This rule applies also to parsonage tithes, which are an inherent burden upon all lands not especially exempted; and from which therefore the person liable cannot prescribe an immunity, by bare non-payment: But such vicarage tithes as are only due, where they are established by usage, may be lost by prescription, *F. 24. July 1678. L. Grant, 2. 10. 5.* In all these cases, though the radical right cannot suffer the negative prescription, the bygone duties, not demanded within the forty years, are lost to the proprietor, superior, or titular.

18. Prescription may be interrupted by any deed, whereby the proprietor or creditor uses his right or ground of debt. It is not only the proprietor or creditor himself who can interrupt, but his heir in the bare right of apparen-
 cy: And even in interruption made by one who had only a putative title, the true creditor afterwards pursuing, tho' he derived no right from the interrupter, was found, by a late decision, entitled to the benefit thereof, *Falc. vol. 1. 136.* In all interruptions, notice must be given to the possessor of the subject, or the debtor, that the proprietor or creditor intends to sue upon his right: And consequently, tho' registration of the ground of debt be in some respects considered as a decree, yet as the defender is not made a party to it, it is no interruption; nor citations which proceed on blank summonses,
 Interruption of prescription.
 Registration makes no interruption, nor citations on

blank summonses.

monses, 4. 1. 35. ; because these had no relation to any special ground of debt. All writings whereby the debtor himself acknowledges the debt, and all processes for payment brought, or diligences used against him upon his obligation, by horning, inhibition, arrestment, &c. must be effectual to interrupt prescription.

Interruptions by citation prescribe in seven years, if not renewed.

Requisites of interruption in the prescription of real rights.

19. Interruptions, by citation upon libelled summonses, where they are not used by a minor, prescribe, if not renewed every seven years, by 1669, c. 10. : But, where the appearance of parties, or any judicial act, has followed thereupon, it is no longer a bare citation, but an action which subsists for forty years. By this statute, citations for interrupting the prescription of real rights must be given by messengers ; and by 1696, c. 19. the summonses, on which such citations proceed, must pass the signet upon a bill, and be registered within sixty days after the execution, in a particular register appointed for that purpose : And, where interruption of real rights is made *via facti*, an instrument must be taken upon it, and recorded in the said register ; otherwise it can have no effect against singular successors.

Effect of interruption.

Minority is not interruption.

20. Interruption has the effect to cut off the course of prescription, so that the person prescribing can avail himself of no part of the former time, but must begin a new course, commencing from the date of the interruption. Minority, therefore, is no proper interruption, for it neither breaks the course of prescription, nor is it a document or evidence taken by the minor on his right : It is a personal privilege competent to him, by which the operation of the prescription is indeed suspended, during the years

years of minority, which are therefore discounted from it; but it continues to run after majority, and the years before and after the minority may be conjoined to complete it. The same doctrine applies to the privilege arising from one's incapacity to act, *supr.* § 15.

21. Diligence used upon a debt, against any one of two or more co-obligants, preserves the debt itself, and so interrupts prescription against all of them; except in the special case of cautioners, who are not affected by any diligence used against the principal debtor, 1695, *c.* 5. When the partial interruption secures the whole right.

In the same manner, a right of annualrent, constituted upon two separate tenements, is preserved as to both from the negative prescription, by diligence used against either of them, 22. June 1671, Lord *Balmerino*. But whether such diligence has also the effect to hinder the possessor of the other tenement, by singular titles, from the benefit of the positive prescription, may be doubted; for no interruption can be said to be thereby made against the possessor; and, if he continues his possession for the term of prescription, he seems to be precisely in the case of the statute 1617. This is certain, that interruption made against the possessor of a barony, by arresting or levying the mails and duties of any part of it, interrupts his prescription of the whole; for a barony is *nomen universitatis*, or *unum quid*, 2. 6. 7. Interruption against the possessor of a barony.

TIT. 8. *Of Succession in Heritable Rights.*

Succes-
sors, sin-
gular and
universal.

Singular successors are those who succeed to a person yet alive, in a special subject, by singular titles; but succession, in its proper sense, is a method of transmitting rights from the dead to the living. Heritable rights descend by succession to the heir properly so called; moveable rights to the executors, who are sometimes said to be heirs in moveables.

Succession
by special
destina-
tion; and
legal suc-
cession.

Succession is either by special destination, which descends to those named by the proprietor himself; or legal, which devolves upon the persons whom the law marks out for successors, from a presumption, that the proprietor would have named them, had he made a destination. The first is in all cases preferred to the other, as presumption must yield to truth.

Order of
succession
in heri-
tage.

Heirs at
law.

Descen-
dents.

2. In the succession of heritage, the heirs at law are otherwise called heirs general, heirs whatsoever, or heirs of line; and they succeed by the right of blood, in the following order. First, descendants, whose preference before ascendants or collaterals, is established by the universal consent of nations. The Romans divided the succession equally among all the immediate descendants of the deceased; but we, from our close attention to the feudal plan, prefer sons to daughters, and the eldest son to all the younger. Where there are daughters only, they succeed equally, and are called heirs-portioners. Failing immediate descendants, grand-children

children succeed; and, in default of them, great-grand-children, and so on *in infinitum*; preferring, as in the former case, males to females, and the eldest male to the younger.

3. Next after descendents, collaterals succeed; among whom the brothers *german* of the deceased have the first place, *i. e.* brothers both by father and mother; for the full blood excludes the half blood. But as, in no case, the legal succession of heritage is, by the law of Scotland, divided into parts, unless where it descends to females; the immediate younger brother of the deceased excludes the rest, according to the rule, *heritage descends*. Where the deceased is himself the youngest, the succession goes to the immediate elder brother, as being the least deviation from this rule, *Pr. Falc.* 9.—*New Coll.* 2. 137. If there are no brothers *german*, the sisters *german* succeed equally, then brothers *consanguinean*, *i. e.* by the father only, in the same order as brothers *german*; and failing them, sisters *consanguinean* equally. Next, Ascendents. the father succeeds, tho' by our ancient usage he was excluded, *Cr.* 321. § 46. After him his brothers and sisters, according to the rules already explained; then the grandfather; failing him, his brothers and sisters; and so upwards, as far back as propinquity can be proved. Though children succeed to their mother, a mother cannot to her child, nor is there any succession by our law through the mother of the deceased; insomuch that one brother *uterine*, *i. e.* by the mother only, cannot succeed to another, even in that estate which flowed originally from their own common mother, 5. Feb. 1663, *Lennox*.

4. In

Right of
representa-
tion in
heritage.

*Successio
in capita.*

*Successio in
stirpes.*

Succession
of heirs-
portion-
ers.

4. In heritage there is a right of representation, by which one succeeds, not from any title in himself, but in the place of, and as representing some of his deceased ascendants. Thus, where one leaves a younger son, and a grandchild by his eldest, the grandchild, tho' farther removed in degree from the deceased than his uncle, excludes him, as coming in place of his father the eldest son. Hence arises the distinction between succession *in capita*, where the division is made into as many equal parts as there are *capita* or heirs, which is the case of heirs-portioners; and succession *in stirpes*, where the remoter heirs draw no more among them than the share belonging to their ascendant, or *stirps*, whom they represent; an example of which may be figured in the case of one who leaves behind him a daughter alive, and two granddaughters by a daughter deceased. Tho' the right of succession does, in no case, fall to the mother of the deceased, nor to his relations by her; yet as children succeed to their mother, therefore, in every case where the mother herself would have succeeded, had she been alive, her children also succeed, as representing her.

5. In the succession of heirs-portioners, indivisible rights, e. g. titles of dignity, fall to the eldest sister. A single right of superiority goes also to the eldest; for it hardly admits a division, and the condition of the vassal ought not to be made worse, by multiplying superiors upon him. Where there are more such rights the eldest may perhaps have her election of the best; but the younger sisters are entitled to a recompense, in so far as the divisions are unequal;

equal ; at least, where the superiorities yeild a constant yearly rent, *e. g.* a yearly feu-duty. The principal seat of the family falls to the eldest, with the garden and orchard belonging to it, without recompense to the younger sitters, 1743. *Pedies* ; but all other houses are divided amongst them, together with the lands on which they are built, as parts and pertinents of these lands.

6. Those heritable rights, to which the deceased did himself succeed as heir to his father or other ancestor, get sometimes the name of heritage in a strict sense, in opposition to the *feuda nova*, or feus of conquest, which he had acquired by singular titles, and which descend, not to his heir of line, but of conquest. This distinction obtains only, where to or more brothers or uncles, or their issue, are next in succession ; in which case, the immediate younger brother, as heir of line, succeeds to the proper heritage, because that descends ; whereas the conquest ascends to the immediate elder brother, *2. Att. c. 88.* It has no place in female succession, which the laws divides equally among the heirs-portioners, *K. 3.* Where the deceased was the youngest brother, the immediate elder brother, whether of the same or of a former marriage, is heir both of line and of conquest, 20. *July 1664, Lady Clerkington*, contrary to the opinion of *Craig, p. 336.* An estate, disposed by a father to his eldest son, is not conquest in the son's person, but heritage ; because the son would have succeeded to it, tho' there had been no disposition. The heir of conquest succeeds to all rights affecting land, which require seisin to perfect them ; and consequently,

Heir of
conquest

has no
place in
female
succession.

What is
included
in con-
quest.

sequently, to dispositions or heritable bonds, tho' they should not be actually followed by seisin, *Hope Min. Pr. p. 40.*—8. *Jan. 1740, D. Hamilton.* But teinds go to the heir of line; because they are merely a burden on the fruits, not on the land, 16. *Dec. 1736, Greenock.* Tacks do not fall under conquest, because they are complete rights without seisin, 23. *June 1663, Ferguson:* No personal bonds taken to heirs secluding executors, both for the reason just mentioned, and because they are heritable, not *ex sua natura*, but by the force of destination; and therefore that heir is understood in the destination, who is heir in the most proper sense, 8. *Jan. 1740, D. Hamilton.*

Heirship-
move-
ables;

what is
included
in them:

Every de-
fect can
not trans-
mit them;

7. The heir of line is entitled to the succession, not only of subjects properly heritable, but to that sort of moveables called *heirship*, which is the best of certain kinds, 1474, c. 54. This doctrine has been probably introduced, that the heir might not have an house and estate to succeed to, quite dismantled by the executor. The list of heirship-moveables, contained in *L. B. c. 125.* is imperfect; and indeed all such lists must be greater or less, according to the variety of moveables belonging to the deceased. In that sort which goes by pairs or dozens, the best pair or dozen is the heirship. There is no heirship in fungibles, or things estimated by quantity, as grain, hay, current money, &c. To entitle an heir to this privilege, the deceased must have been either, 1. A Prelate: 2. A Baron, *i. e.* one who stood inest at his death in lands, tho' not erected into a barony; or even in a right of annualrent. Or, 3. A burghess; not an honorary one, but a trading

trading

trading burghs of a royal borough, or at least one entitled to enter burghs, in the right of his ancestor, *F. 22. Nov 1698, Cumin*. Neither the heir of conquest, nor of tailzie, has right to heirship moveables. they fall to the heir of line.

8. As to succession by destination, no prior can settle any heritable estate, in the proper form of a testament; not even bonds settling executors, tho' these are not heritable Heritage cannot be settled by testament. *ex sua natura*: But, where a testament is, in part, drawn up in the style of a deed *inter vivos*, such part of it may contain a settlement of heritage, tho' executors should be named in the testamentary part. The common method of settling the succession of heritage, is by disposition, contract of marriage, or simple procuratory of resignation: And, tho' a disposition settling heritage should have neither precept nor procuratory, it founds an action against the heir of line to complete his titles to the estate, and thereafter divest himself in favour of the donee. All heirs by destination may properly enough be called, by a general name, heirs of tailzie, from *tailer* to cut, because the lineal succession is cut off in their favour; but they are usually distinguished into heirs of tailzie, and of provision. Heirs of tailzie and of provision; The appellation of tailzie, how they differ. or entail, is chiefly used in the case of a land-estate, which is settled on a long series of heirs substituted one after another; whereas heirs pointed out in contracts of marriage, or in bonds containing clauses of substitution, are more commonly called heirs of provision. The person first called in the tailzie, is the institute; the rest, the heirs of tailzie, or the substitutes. Heir-male. Tailzies are frequently made in favour of the heir.

heir-male, *i. e.* of the nearest legal heir to the granter, who is himself a male, and whose propinquity is wholly connected by males, without the intervention of any female.

Simple
destina-
tion,

lays no
restraint
on the
heir.

Tailzies
with pro-
hibitory
clauses
cannot be
altered
gratui-
tously.

9. Tailzies, when considered in relation to their several degrees of force, are either, 1. Simple destinations: 2. Tailzies with prohibitory clauses: Or, 3. Tailzies with prohibitory, resolute, and irritant clauses. That is a simple destination, where the persons called to the succession are substituted one after another, without any restraint laid on the exercise of their property. The heirs, therefore, succeeding to such estate, are absolute fiars, and consequently may alter the destination at pleasure: Nor can inhibition, used against them by the next substitute, cut off this right of fee; for inhibition supposes an antecedent obligation on the debtor, which that diligence is intended to secure to the inhibitor; whereas, in a simple destination, the several heirs lie under no obligation, and the substitutes have only the hope of succession.

10. In tailzies with clauses prohibitory, *e. g.* declaring that it shall not be lawful to the heirs to contract debts, or alien the lands, in prejudice of the succession, none of the heirs can alien gratuitously; for a proper right of credit is thereby created to the several substitutes, who may, in the character of creditors, reduce such alienations upon the statute 1621, afterwards to be explained, *F. 28. Jan. 1687, E. Callander.* But the members of entail may contract debts which will be effectual to the creditors, or may dispose of the estate for onerous causes, since the fee subsists in their person; even tho' the substitutes,

substitutes, as creditors by the prohibitory clause, have used inhibition on the tailzie to secure themselves against the effect of future contractions, *New Coll. 2. 211.* In both these sorts, the maker himself may alter the tailzie; except, 1. Where it has been granted for an onerous cause, as in mutual tailzies, 14. *Jan. 1631 Sharp*; or, 2. Where the maker is expressly disabled, as well as the institute, or the heirs, *Br. 119.*

11. Where a tailzie is garded with irritant and resolute clauses, the estate entailed cannot be carried off by the debt, or deed, of any of the heirs succeeding thereto, in prejudice of the substitutes. It was long doubted, whether such tailzies ought to be effectual, even where the superior's consent was adhibited; because they sunk the property of estates, and created a perpetuity of liferent. The first judgment confirming them, was 26. *Feb. 1662, V. Stormount*; and thereafter they were explicitly authorised by 1685, c. 22. By this statute, the entail must be registered in a special register established for that purpose; and the irritant and resolute clauses must be inserted, not only in the procuratories, precepts, and seilins, by which the tailzies are first constituted, but in all the after-conveyances thereof; otherwise they can have no force against singular successors, see *K. 52.*: But a tailzie, even without these requisites, is effectual against the heir of the granter, or against the institute who accepts of it, *K. 47.* That part of the act which requires the registration of tailzies, in order to their affecting singular successors, was found to have no retrospect to tailzies made prior thereto, *K. 89.*: But this was reversed by a judgment of the

Inhibition
may be
served up-
on them by
the substi-
tute.

Tailzies
with irri-
tant and
resolute
clauses.

Their re-
quisites.

House of Peers; and, indeed, the security of creditors calls for registration equally in all tailzies, and the act 1690, c. 33. makes no exception; *New Coll.* 2. 145. It has been always an agreed point, that the act 1685 regulates the posterior transmissions, even of tailzies dated before it; so that, in all these, the irritant clauses must be repeated, *K.* 60. Retours upon general services are not properly transmissions of an estate; they only give right to unexecuted procuratories of resignation and precepts of seisin; and therefore they do not fall under that statute.

They are
stricti juris.

12. An heir of entail has full power over the entailed estate, except in so far as he is expressly fettered, *New Coll.* 2. 13.; and as entails are an unfavourable restraint upon property, and a frequent snare to trading people, they are *strictissimi juris*; so that no prohibition or irritancies are to be inferred by implication. Hence, though all debts to be contracted by the heir, should, by the entail, be declared null, but without irritating the right of the heir contracting 22. July 1712, cred. of *Ricarton*, or *vice versa*, tho' there should be a clause irritating the right of the heir who contracts, but without declaring the debts contracted null, 11. July 1734, *Bailly*; the court will not interpose to supply the defect, from presumed intention. For the same reason, a prohibition to alter the succession, tho' under an irritancy, does not disable the heir from contracting debt, *Falc.* 1. 116.; nor does a prohibition to contract debt hinder him from selling, *Falc.* 2. 92*.

13. An

* By act 10. *Geo.* III. c. 51. a faculty is given to heirs of entail to charge the estate with sums laid out in improvements, under certain conditions, *vide act.*

13. An heir, who counteracts the directions What of the tailzie, by aliening any part of the e- deeds in- state, charging it with debt, &c. is said to con- fer contra- travene. It is not the simple contracting of vention. debt that infers contravention; the lands entailed must be actually adjudged upon the debt contracted, *K. 34.* An heir may, where he is not expressly barred, settle a jointure on his wife, not exceeding the terce; because the provisions of law are not excluded in tailzies, by implication, *K. 90.* But the settling provisions on children, being a positive deed of the granter, was found to import contravention, by *Feb. 1730, Borthwick*, which, however, was reversed upon appeal. One might think, that, by the words of Does the the act 1685, the contravener forfeits, not only contrave- for himself, but for the heirs of his body, where ner forfeit for the heirs of there is no express clause in the entail restrict- his body? ing it; but the more favourable opinion, which confines the penalty to the contravener, has been received by a decision, *F. 6. Jan. 1697, Simpson*: Yet, for the greater security, a clause is generally inserted in tailzies, that the forfeiture shall not affect the descendants of the contravener, when such is the intention of the entailer. Before the next heir can take the e- How the state on the contravention of the former, he heir serves upon a de- must declare the irritancy against the contra- clarator of vener; after which, he is directed by the sta- irritancy. tute to serve himself heir to him who died last infest in the fee, and did not contravene.

14. When the heirs of the last person specially called in a tailzie come to succeed, the irritancies have no longer any person in favour of whom they can operate; and, consequently, the fee, which was before tailzied, becomes simple

In what
cases an
heir of en-
tail may
sell.

simple and unlimited in the person of such heirs. 29. *Dec. 1710. Lesly.* By the late act for abolishing ward holdings. 20. *Geo. II c. 50.* the King may purchase lands within Scotland, notwithstanding the strictest entail; and, by act 51. of the same year, where the lands are in the hands of minors or fatuous persons, his Majesty may purchase them from the curators or guardians. These acts appear, by their preamble, to be limited to lands lying in the Highlands of Scotland; but the enacted words of both are general. By the first of the above quoted statutes, heirs of entail may sell to their vassals the superiorities belonging to the entailed estate; but, in all these cases, the price is to be settled in the same manner that the lands or superiorities sold were settled before the sale.

Rights ta-
ken in con-
junct fee to
strangers.

15. Rights, not only of land estates, but of bonds (which last are called *quasi feuda*, or *feuda nominum*.) are sometimes granted to two or more persons in conjunct fee. Where a right is so granted to two strangers, without any special clause adjoined to it, each of them has an equal interest in the fee, and the part of the deceased does not accrue to the survivor, but descends to his own heir. If the right be taken to the two jointly, and the *longest liver* and their heirs, the several shares of the conjunct fiars are affectable by their creditors, during their lives; but, on the death of any one of them, the survivor has the fee of the whole, exclusive of the heir of the predeceased, in so far as the share of the predeceased remains free, after payment of his debts, *Falc. vol. 1. 206.* Where the right is taken to the two in conjunct fee, and to the heirs of one of them, he

to whose heirs the right is taken, is the only *fiar*; the right of the other resolves into a simple *liferent*: Yet, where a father takes a right to himself and his son jointly, and to the son's heirs, such right being gratuitous, and granted only in consequence of the natural obligation by which parents are bound to provide for their children, is not understood to strip the father of the fee, unless a contrary intention shall plainly appear from the tenor of the right.

16. Where a right is taken to a husband and wife, in conjunct fee and *liferent*, the husband, as the *persona dignior*, is the only *fiar*: The wife's right resolves into a *liferent*, *Dirl.* 85. unless it be presumeable, from special circumstances, that the fee was intended to be in the wife; e. g. if the right flowed from her, or has been taken to her assignees, 4. *Feb.* 1709, *Fead*, or if the last termination of the settlement falls upon the wife's heirs, *St.* 3. 5. 51. *vers.* 3.—*St. Anf. voce Fee*: Though our decisions seem to have laid but little stress upon this last presumption, see *Diction. voce, Fiar*. Where a right of moveables is taken to husband and wife, the heirs of both succeed equally, according to the natural meaning of the words, 2. *Feb.* 1632, *Bartholemew*.

17. Heirs of provision are those who succeed to any subject, in virtue of a provision to the investiture, or other deed of settlement. This appellation is given most commonly to heirs of a marriage. These are more favourably regarded than heirs by simple destination, who have only the hope of succession; for heirs of a marriage, because their provisions are constituted by an onerous contract, cannot be disappointed.

pointed
by gratuitous
deeds ;

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father can
contract
debt,

unless he
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restrain
himself.

ed of them by any gratuitous deed of the father ; and they may sue him or his cautioner to purge incumbrances. or to make good their provisions, in the event of his death, 5. *Dec.* 1734, *Fotheringham*. Nevertheless, as their right is only a right of succession, which is not designed to restrain the father from granting onerous or rational deeds, he continues to have the full power of selling the subject, or charging it with debts, unless a proper right of credit be given to the heir by the marriage contract, *e. g.* if the father should oblige himself to invest the heir in the lands, or make payment of the sum provided against a day certain, or when the child attains a certain age, *K.* 45. 51. ; or if the father should be restrained from the contracting of debt ; for such rights, when perfected by investment, or secured by diligence, are effectual against all the posterior deeds of the father, even onerous ; see *P. Falc.* 30. Nothing but the hope of a right is created to such of the substitutes in a marriage-contract as are called after the issue of the marriage : For the parties contracting (the husband and wife) are interested no farther than to provide their issue of that marriage : As to the other substitutes, it is a simple destination, alterable at pleasure.

Effect of
provisions
to children
existing.

18. Though all provisions to children, by a marriage contract conceived in the ordinary form, being merely rights of succession, are postponed to every onerous debt of the granter, even to those contracted posterior to the provisions ; yet, where a father executes a bond of provision to a child actually existing, whether such child be the heir of a marriage or not, a proper debt is thereby created, which, tho' it be

be without doubt gratuitous, is not only effectual against the father himself and his heirs, but is not reducible at the instance even of his prior onerous creditors, if he was solvent at the time of granting it, 4 1. 1. 3. A father may, notwithstanding a first marriage-contract, settle a jointure on a second wife, or provide the children of a second marriage; for such settlements are deemed onerous; but, where they are exorbitant, they will be restricted to what is rational: and in all such settlements, where the provisions of the first marriage-contract are encroached upon, the heirs of that marriage have recourse against the father, in case he should afterwards require a separate estate, which may enable him to fulfill both obligations, 27. Jan. 1730, *Henderson*.

19. In marriage contracts, the conquest, or a certain part thereof, is frequently provided to the issue; by which is understood, whatever real addition shall be made to the father's estate during the marriage, by purchase or donation*. Conquest therefore must be free, *i. e.* the debts must be deducted in the computation. What the husband succeeds to, during the marriage, as heir to an ancestor, is not conquest. As in other provisions, so in conquest, the father is still fiar, and may therefore dispose of it for onerous or rational causes. Where heritable rights are provided to the *heirs* of a marriage, they fall to the eldest son, for he is the heir at law in heritage. Where a sum of money is so provided, the word *heir* is applied to

The father's powers in a second marriage-contract.

Provision of conquest in a marriage-contract.

Provision taken to heirs.

* If a person sells one estate and with the price thereof purchases another, it is not to be accounted conquest, 27. June 1676, *Dumferline*.

Provision
to bairns.

to the subject of the provision, and so marks out the executor, who is the heir in moveables, K. 95. Where an heritable right is provided to the *bairns* (or issue) of a marriage, it is divided equally among the children, if no division be made by the father; for such destination cuts off the exclusive right of the legal heir, F. 11. Jan. 1678, *Kinloch*, observed in *Dict* 2. 275. No provision granted to bairns gives a special right of credit to any one child, as long as the father lives: The right is granted *familiae*; so that the whole must indeed go to one or other of them; but the father has a power inherent in him, to divide it among them, in such proportions as he thinks best; yet so as none of them may be entirely excluded, 16. Dec. 1738, *Campbell*; except in extraordinary cases, an instance of which, in a provision, even to the heir of a marriage, may be seen in K. 50.

Different
acceptations
of the
word *heir*.

20. Tho' by the general term of *heir*, is understood, in the common case, the heir whom the law points out, yet where there has been an antecedent destination of a subject limiting the succession to a certain number of heirs, the general word *heir*, in all the posterior settlements, either of that subject, or of any other intimately connected with it, signifies *in dubio*, not the legal heir, but the heir of the investiture. Thus, if one, who has taken a right of lands to his heir-male, should thereafter acquire a right of reversion of these lands to his heirs indefinitely, such reversion would go, not to the heir at law, but to the heir-male. Upon the same principle, if a superior of lands should afterwards acquire the property, or the proprietor any real right affecting

affecting them, such posterior acquisitions would not descend to the heir of conquest, though they were purchased by the ancestor, but to that heir to whom the first rights were provided, 8. Jan. 1740, D. Hamilton.

21. As, by the Roman law, no man could name an heir, to his own heir who was past pupillarity, their substitutions were really no more than conditional institutions, which meant only, that if the institute either could not, or was not willing to take the succession, the substitute might; but, where the succession was actually taken up by the institute, it devolved, after his death, on his own heir, and not on the substitute. With us, clauses of substitution, when inserted in tailzie's, have been always understood to give the substitute a right, at what time soever the institute died, *quandocunque defecerit*, although he had taken the succession before his death: And substitutions in testaments, 13. July 1681, *Christie*, marriage-contracts and bonds, *Harc.* 370.—17. Nov. 1747, *Anderson*,—26. June 1634, *Keith*, are also governed by the same rule; unless it be presumeable, from special circumstances, that no more is intended by the parties, than a conditional institution, *Harc.* 390.—F. 23. Feb. 1697, *Dickson*; yet see *Dirlet. Doubts, voce, Substitution in Legacies*. A simple substitution gives the substitute no more than the hope of succession, *supr.* § 9.; but, where a prohibition is adjoined, that no deed shall be done to hurt it, the institute cannot dispose of the subject, unless for onerous, or at least rational causes, 8. July 1673, *Graham*. A prohibition is implied in the substitution of

Substitution,
tion,

what by
the Ro-
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it is either
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or guard-
ed with a
prohibi-
tion.

children mutually to one another, *New Coll.*
34.

Provision of return ; its effects. 22. A clause of return is that by which a sum in a bond, or other right, is, in a certain event, limited to return to the granter himself, or his heirs. When a right is granted for onerous causes, *e. g.* a bond for borrowed money, the creditor may defeat the clause of return, even gratuitously ; because such clause is presumed to proceed merely from his own good-will, and so is of the nature of a simple destination, 28. *Jan. 1737, Robertson* : But, where the sum in the right flows from the granter, as in bonds of provision, donations, &c. or where there is any other reasonable cause for the provision of return in his favour, the receiver cannot dis-appoint it gratuitously, 31. *Jan. 1679, Drummond*. Yet, since he is *fiar*, the sum may be either assigned by him for an onerous cause, or affected by his creditors ; nay, he may sue for payment, without giving security that the return shall be made effectual, since his faith was trusted at granting the right, unless he be *vergens ad inopiam*, 10. *June, 1747, Beatson*.

All heirs represent the deceased universally, except heirs substituted in a bond, or heirs of provision. 23. An heir is, in the judgment of law, *eadem persona cum defuncto*, and so represents the deceased universally, not only in his rights, but in his debts : In the first view, he is said to be heir *activé* ; in the second, *passivé*. From this general rule are excepted, heirs substituted in a special bond, 3. *July 1666, Fleming* ; and even substitutes in a disposition *omnium bonorum* to take effect at the granter's death, 5. *Jan. 1745, Mercer* ; for such substitutes are considered as singular successors, and their right as a universal legacy, which does not subject the legat

gatee *ultra valorem*. But heirs-male, or of tailzie, tho' their right be limited to special subjects, are nevertheless liable, not merely to the extent of the subject entailed or provided, but *in solidum*; because such rights are designed to carry an universal character, and so infer an universal representation of the granter.

24. The heir of line is primarily liable for the debts of his ancestor; for he is the most proper heir, and so must be discussed by creditors before any other can be sued. Next to him, the heir of conquest; because he also succeeds to the *universitas* of the whole heritable rights which his ancestor had acquired by singular titles. Then the heir-male, or of a marriage; for their propinquity of blood subjects them more directly than any other heir of tailzie, who may possibly be a stranger, and who, for that reason, is not liable till all the rest be discussed, except for such of the ancestor's debts or deeds as relate specially to the lands tailzied; as to which he is liable, even before the heir of line, *St. 3. 5. 17.* Heirs portioners are liable, *pro rata*, for their ancestor's debts; but, if any of them prove insolvent, the creditor may, after discussing her, innit for her share against the rest, *Dirl. 10.* who will be liable, not indeed *in solidum*, but to the extent of the benefit accruing to them by the succession, *F. 21. June 1698, White.* Where an heir liable *subsidiarie*, pays the ancestor's debt, action of relief is competent to him against that heir who is more directly liable; in respect of whom he is not co heir, but creditor, *3. 4. 10.*

25. Before an heir can have an active title to his ancestor's rights, he must be entered by

The order in which heirs are liable.

Relief among heirs.

Apparent
heirs,
their pri-
vileges.

by service and retour. He who is entitled to enter heir is, before his actual entry, called apparent heir. The bare right of apparency carries certain privileges with it. An apparent heir may defend his ancestor's titles against any third party who brings them under challenge, 19. Jan. 1627, *L. Roslin*. Tenants may safely pay him their rents; and after they have once acknowledged him by payment, he may compel them to continue it, *Gilm.* 94. The older decisions considered the rents not levied by an apparent heir, who was entered into possession, as his property; insomuch, that they might not only be affected, during his life, by the diligence of creditors, but even confirmed, after his death, by his executors. Thereafter, it was adjudged, that, though apparency be a title of possession, the rents which the heir did not really receive, and to which he had made up no right by entry after his death, were from the necessity of law, in *hereditate jacente* of the person last intest, *Harc.* 71; but our judges have, by *New Coll.* 181. returned to the first doctrine, that the rents not uplifted by the apparent heir belong to his executors, upon this principle, that the heir's right to them arises, *ipso jure*, from his title to possess, and not from his actual possession.

*Jus deli-
berandi,*

26. As an heir is, by his entry, subjected universally to his ancestor's debts, apparent heirs have therefore a year (*annus deliberandi*) allowed to them from the ancestor's decease, to deliberate whether they will enter or not, *tit. C. de jure delib.*; till the expiring of which, though they may be charged by creditors to enter, they cannot be sued in any process founded

founded upon such charge *. Though declaratory actions, and others which contain no personal conclusion, may be pursued against the apparent heir without a previous charge, action does not lie, even upon these, within the year, if the heir cannot make the proper defences without incurring a passive title, 26. *June 1667, Deuar*: But judicial sales, commenced against an ancestor, may be continued upon a citation of the heir, without waiting the year of deliberating, by special act of sederunt, 23. *Nov. 1711, § 5*. This *annus deliberandi* is computed, in the case of a posthumous heir, from the birth of such heir. An apparent heir, who, by immixing with the estate of his ancestor, is as much subjected to his debts as if he had entered, can have no longer a right to deliberate whether he will enter or not, *Dirl. 450*.

protects
the heir
from suits
for a year,

An appa-
rent heir
immixing
loses his
*ius delibe-
randi*.

27. The apparent heir may, even after this year is expired, sue havers, *i. e.* custodians or possessors, for exhibition of all writings pertaining to his ancestor, and also of all deeds granted by him, whether to those of his own family, or to strangers, *Br. 112.*; that he may thereby be enabled to balance his ancestor's estate with his debts. An apparent heir, who has renounced the succession, cannot sue for exhibition against that creditor at whose suit he was charged to enter heir; because his renunciation upon the charge imports an approbation of the charger's right, *Jan. 1721, Richardson*: But such renunciation does not exclude exhibition

An appa-
rent heir
may pur-
sue exhibi-
tion even
after the
year.

* The objection that diligence was used within the *annus deliberandi*, is not personal to the heir, but may be pleaded by creditors having an interest in it, *New Coll. 2. No. 76*.

tion against any other creditor ; its effect being restricted to the special debt which was the ground of the charge, 8. *Jan.* 1675, *Waird*. For other privileges of apparency, 2. 6. 23.—2. 9. 33.—2. 12. 27.

Service of heirs, proceeds on a brief, which is retourable. 28. All services proceed on brieves from the chancery, which are called brieves of inquest, and have been long known in Scotland, *St. R.* III. c. 1. The judge to whom the brief is directed is required to try the matter by an inquest of fifteen sworn men ; which inquest cannot sit till fifteen days after the brief has been proclaimed, 1503, c. 94. at the market-cross of the head-borough ; see § 29. And this proclamation to all and sundry, supercedes the necessity of citing any particular person as party to the service. The inquest, if they find the claim verified, must declare the claimant heir to the deceased, by a verdict or service, which the judge must attest. The brief of inquest was from the beginning retourable, *i. e.* it behoved the judge to return the brief, with the service proceeding on it, to the chancery, *arg. St. R.* III. c. 1. § 3. ; but it would appear, that from that period to the year 1550, the obtainer of the brief got the service delivered to him, either by the judge or by the chancery ; for many of our oldest families have at this day in their keeping the authentic services of their ancestors, with the seals of the inquest appended to them. And hence, a principal service dated before 1550, was sustained, tho' there had been no evidence of its having been retoured to the chancery, 17. *Feb.* 1624, Lord *Elphinston*. But, from that time, no service has been deemed complete, till it be retoured,
F. 2.

F. 2. Feb. 1698, *Mackintosh*; after which, the heir served may, on his application, get an extract thereof from the chancery; but the service is complete, tho' such extract should not be demanded. The brief of mortancestry (*de morte antecessoris*) was the ground of a proper action, and related to the particular case where the heir was excluded from the possession of the lands by the superior, or other person pretending right to them, whom therefore it was necessary to call as a party to the suit, *R. M. l. 3. c. 28. et seqq.*—*Q. Att. c. 52.*

Brief of
mortan-
cestry.

29. The service of heirs is either general, or General special. A general service vests the heir in the right of all heritable subjects, which either do not require seisin as reversions, bonds secluding executors, heirship-moveables, &c. or which have not been perfected by seisin in the person of the ancestor, as dispositions, heritable bonds, &c.; but it can carry no right clothed with infestment, not even the personal obligation contained in a right of annualrent on which seisin had followed, so as to be a title to demand payment from the debtor, *Jan. 1729, Lord Halkerton*. The brief on which a general service proceeds, may be directed to any judge-ordinary, 6. *March 1630, L. Caskeyben*, and must be proclaimed in the jurisdiction where it is to be served. A special service, followed by Special seisin, vests the heir in the right of the special subjects in which the ancestor died infest; and the brief must be directed, either to the sheriff of the county, or bailie of the borough where the subjects lie; or, by special warrant of the court of session, to delegates, generally the macers of the session, to whom the court, in cases

service.
Special
service.
sometimes
commit-
ted to de-
legates.

cases of difficulty, join one or two of their own number, as assessors. The proclamation of this brief must, in all cases, be made at the head-borough of the jurisdiction where the lands lie. The style of all briefs, whether a general or a special service be intended, is the same, and contains seven distinct heads, which the inquest is commanded to answer. Where the heir claims to be served in special, all of them must be answered; but, in a general service, the inquest answers only the two first.

Heads of
the brief
answered
in a gene-
ral ser-
vice.

30. The two questions to be answered in a general service are, first, Whether the ancestor died at the peace of the Sovereign? This is inquired into, on account of the fisk; for, where one dies in rebellion, his whole estate forfeits to the crown; but the affirmative is presumed, unless actual rebellion be proved. Rebellion, in consequence of a denunciation upon letters of horning, is no bar to the service, 21. Nov. 1626, *Seaton*. The second question is, Whether the claimant be the next and lawful heir to the deceased? The legitimacy is presumed; but the propinquity must be proved, either by witnesses, or, if it be remote, by proper evidence in writing. The particular degrees, by which it is connected, ought to be specially set forth in the claim and service, 22. July 1629, *E. Cassils*. That degree which is proved, is presumed to be the nearest, unless the proof of a nearer be instantly offered; and the remotest degree excludes the crown's right, as *ultimus heres*.

Heads in
a special
service.

31. In a special service, the claimant must prove, upon the first head above mentioned, the precise time of the ancestor's death, that
it

it may be known how long the lands have been in non-entry; and that the deceased stood infest at his death, in the lands contained in the claim, which is instructed by his seisin. The following five heads are also inquired into in a special service. 1. Of what superior the lands are held *in capite*, or immediately. 2. By what manner of holding. 3. What their extent is, both old and new. This last service to fix the rate of the superior's casualties, which is governed by the new extent; and perhaps was also intended to ascertain the heir's proportion of public subsidies, which, till 1649, was regulated by the old extent, 2. 5. 16. As the non-entry, due out of the lands formerly holden ward of the crown, is now proportioned by the valued rent, the late act for abolishing ward-holdings provides, that the valuation shall also be inserted in the retours of such lands. 4. Whether the claimant be of lawful age. This head was formerly necessary in ward-holdings, in which the superior was not bound to enter the heir, while he was minor; but now, that ward-holdings are abolished, the question must be always answered in the affirmative. The last head, in whose hands the fee has been since the ancestor's death, serves to shew whether non-entry be due; for if the lands have been possessed by a tercer or liferenter, it is excluded,

2. 5. 20.

32. If an heir, doubtful whether the state Entry of his ancestor be sufficient for clearing his ancestor by debts, shall, at any time within the *annus delib-* inventory
erandi, exhibit upon oath full inventory of all his ancestor's heritable subjects, to the clerk of the shire where the lands lie; or, if there is

no heritage requiring seisin, to the clerk of the shire where he died; and if, after the same is subscribed by the sheriff or sheriff depute, the clerk, and himself, and registered in the sheriff's books, the extract thereof shall be registered within forty days after expiry of the *annus deliberandi* in the general register appointed for that purpose, his subsequent entry will subject him no farther than to the value of such inventory, 1695, c. 24.; borrowed from l. 22. § 2. 3. 4. *C de jure delib.* If the inventory be given up and registered within the time prescribed, the heir may serve on it, even after the year, F. 11. Feb. 1708, *Mackay*.

Creditors need not rest on an estimation of the inventory by witnesses.

An heir by inventory is a trustee for the creditors.

33. There is good ground to conclude, both from the rubric and tenor of this statute, that it was designed, not to deprive creditors of the right of making the most of their deceased debtor's estate, but merely to save the heir from an universal representation. Creditors therefore are not obliged to acquiesce in any presumed value that may arise from the estimation of witnesses; but, if they be real creditors, 1681, c. 17. may bring the estate to a public sale, in order to discover its true value; since an estate is always worth what can be got for it. 12. July 1738, heirs of L. *Glenakindy*. An heir by inventory, as he is, in effect, a trustee for the creditors, must account for that value, to which the estate may have been improved since the death of the ancestor, 6 July 1727, *Aikenhead*; and he must communicate to all the creditors the cases he has got in transacting with any one of them, Dec. 1725, *Aikenhead*. He may, upon a sale, pay the price to the creditors who first apply, June 1733, *Veitch*; but a general de

cre

cree obtained by one creditor, finding the heir liable to the extent of the inventory, gives him no preference over the others, while the subject is *in medio*, 28. Nov. 1738, cred. of *Crichen*

34. Practice has introduced an anomalous Entry
sort of entry, without the interposition of an upon a
inquest, by the sole consent of the superior, who, precept of
if he be satisfied that the person applying to *clare con-*
stat.
him is the next heir, grants him a precept (called of *clare constat*, from the first words of its recital), commanding his bailie to infest him in the subjects that belonged to his ancestor. These precepts are, no doubt, effectual against the superior who grants them, and his heirs; and they may, when followed by seisin, afford a title of prescription: But, as no person can be declared an heir by private authority, they cannot bar the true heir from entering after twenty years, as a legal entry would have done. Of the same nature is the entry by hasp and staple, commonly used in burgage tenements of
houses, by which the bailie, without calling an Entry by
inquest, cognosces or declares a person heir upon hasp and
evidence brought before himself; and, at the staple.
same time, infests him in the subject, by the symbol of the hasp and staple of the door. How far charges given by creditors to apparent heirs to enter, stand in the place of an actual entry, so as to support the creditor's diligence, has been explained, 2. 12. 5.

34. A service, proceeding on a claim as next The ser-
and lawful heir, carries all the subjects descen- vice must
dible to an heir at law, that have not been li- describe
mited by any entail; but it carries no right the special
provided to a certain order of heirs, even tho' character
the claimant should, by the failure of the prior of the
members claimant.

members of tailzie, happen to be also heir of provision; for he ought to have claimed as heir of provision; and the service must be restricted to the claim laid before the inquest, and the evidence brought in support of it, 21. *July 1738, Edgar*: In all succession therefore by provision, in which the heir of line comes also to have right as heir of provision, by the death of the prior members of entail, he ought to be described in the service by that particular character under which he claims. A general service cannot include a special one; since it has no relation to any special subject, and carries only that class of rights on which seisin has not proceeded; but a special service implies a general one of the same kind or character, and consequently carries even such rights as have not been perfected by seisin; for, if the verdict's returning an answer *affirmative*, to the two first heads of the brief, vests those rights in the heir, their answering them jointly with the other five heads of the brief, must have the same effect.

A special service includes a general one of the same kind.

In what cases service is not required.

36. Service is not required to establish the heir's right in titles of honour, or offices of the highest dignity; for these descend *jure sanguinis*. As the bare right of apparenacy entitles an heir to continue his ancestor's possession, an heir may, even without a service, not only levy the rents of a land estate, but enjoy a tack, or any other temporary right belonging to his ancestor: But, though the property of the rents of the ancestor's estate is now adjudged to belong to the apparent heir, *supr.* § 25. it would seem that the right of apparenacy cannot make him proprietor of tacks, or other such heritable

heritable rights belonging to his ancestor; and consequently, it may be doubted whether he can assign such tack to another, more than he can convey his ancestor's land estate; for it is the proprietor alone who has a right to assign. A child who is *nominatim* substituted in a bond to his father, needs no service for proving that the creditor is dead; but where a bond is taken to one and the heirs of his body, whom failing, to a substitute, a service must be obtained by the substitute, for proving that the heirs called before him have failed, *St. 3. 5. 6.* No right clothed with investment can, in any case, be transmitted to substitutes without service.

37. A special service does not carry, out of the *hereditas jacens* of the deceased, the special subjects in which he died invest, until the heir complete it by seisin. Where the lands hold of the crown, the chancery issues precepts for investing the heir, which must be directed to the sheriff of the shire. In lands holden of a subject, the heir may, in place of the former tedious method of running precepts against the superior, *Hope Min. Pr. 55.* obtained a warrant from the session, for letters of horning to charge the superior to receive him, *20. Geo. II. c. 50.* Where the superior is not himself entered, such charge would be inept; in that case therefore the heir must, in terms of *1474. c. 58.* charge the superior to obtain himself entered, within forty days, in the superiority, that so he may be in a capacity of entering his vassal, under the penalty of losing his right for life. If the superior refuse to obey either of these charges, the next superior, as coming in his place, (*supplendo vices*), may be compelled at the suit of

Service must be completed by seisin.

What if the superior refuse to enter the heir.

of the heir to infect him; and thus the heir may proceed against all the intermediate superiors between him and the Sovereign, against whom a charge is both improper and unnecessary; for the crown refuses none; see *Dallas's Styles*, p. 234. The superior, thus entering his subvassal's heir, loses none of the casualties falling by his immediate vassal; seeing what he does is merely an act in obedience.

Passive
titles in
heritage.

*Gestio pro
herede;*

from
what facts
inferred.

38. An heir, by immixing with his ancestor's estate without entry, subjects himself to his debts, as if he had entered; or, in our law phrase, incurs a passive title. The only passive title by which an apparent heir becomes liable universally for all his ancestor's debts, is *gestio pro herede*, or his behaving himself, so as none but an heir has right to do, *l. 20. pr. de adq. vel amit. her.* Behaviour as heir is inferred, from the apparent heir's intromission, after the death of the ancestor, either by himself, his tenants, or factors, with any part of the lands or other heritable subject belonging to the deceased, to which he himself might have completed an active title by entry; even with heirship moveables, which, in the doctrine of succession, are considered as heritage; or with the title deeds or other writings of the deceased. It is inferred without actual intromission, by the heir's conveying to a third party, or even granting discharges of rents or other subjects to which he might have succeeded as heir, or by his consenting to the conveyance of such subjects; see 10. Feb. 1642, *Johnston*. But his bare renunciation of the succession, in favour of another, does not infer it; because nothing

is

is thereby transmitted to the receiver hurtful to the creditors, 5. *July 1666, Scot.*

39. This passive title is excluded, if the heir's intromission be by order of law, *e. g.* How excluded.

intromission with heirship-moveables in consequence of confirmation; or if it be founded on singular titles, and not as heir to the deceased; *e. g.* if he has intermeddled with the heirship, as donatary from the crown to the single escheat of the deceased, or if he has levied the rents of his ancestor's estate, in virtue of an adjudication against it, to which he himself had acquired a right. This last defence was always sustained, tho' the adjudication had proceeded on a bond granted by the heir himself; till the Lords declared, by *Act S. 28. Feb. 1662*, that intromission by the heir, in virtue of an adjudication founded on his own bond, should infer a passive title. And it is

now enacted, by 1695, *c. 24.* that an apparent heir's purchasing any right to his ancestor's estate, otherwise than at a public roup (auction), or his possessing it in virtue of rights settled in the person of any such near relation of the ancestor, to whom he himself may succeed as heir, otherwise than upon purchase by public sale shall be deemed behaviour as heir. A special fort introduced by statute.

40. Behaviour as heir is also excluded, where the intromission is small, unless an intention to defraud the ancestor's creditors be presumeable from the circumstances attending it, 6. *Nov. 1622, L. Dundas.* Neither is behaviour inferred against the apparent heir, from the payment of his ancestor's debt, which is a voluntary act, and profitable to the creditors; nor by his taking out of brieves to serve; for one In what other cases is behaviour excluded. may

may alter his purpose, while it is not completed; nor by his assuming the titles of honour belonging to his ancestor, or exercising an honorary office hereditary in the family; for these are rights annexed to the blood, which may be used without proper representation, *Harc.* 31. But the exercising an heritable office of profit, which may pass by voluntary conveyance, and consequently is adjudgeable, *2. 12. 3.* may reasonably be thought to infer a passive title. Lastly, as passive titles have been introduced, merely for the security of creditors; therefore, where questions concerning behaviour arise among the different orders of heirs, they are liable to one another no farther than *in valorem* of their several intrusions, *20. Nov. 1630, Pride.*

The passive title of *praeceptio hereditatis*.

41. Another passive title in heritage, may be incurred by the apparent heir's accepting a gratuitous right from the ancestor, to any part of that estate to which he himself might have succeeded as heir; and it is called *praeceptio hereditatis*, because it is taking of the succession by the heir before it opens to him by the death of his ancestor. If the right be onerous, there is no passive title; but its onerosity must be proved otherwise than by the assertion of the granter in the recital: If the consideration paid for it does not amount to its full value, the creditors of the deceased may reduce it, in so far as it is gratuitous, upon the statute 1621; but still it infers no passive title. Tho' the right accepted of be granted to fulfil a marriage contract, it is not, for that reason, to be deemed onerous; for the heir of a marriage has only a right of succession, subject

to

* A right to a future

to the payment of the father's debts, 22. Feb. 1681, *More* *.

42. The heir incurring this passive title is no farther liable, than if he had at the time of his acceptance, entered heir to the granter, and so subjected himself to the debts that were then chargeable against him; but with the posterior debts he has nothing to do, not even with those contracted between the date of the right, and the investment taken upon it, Feb. 1721, L. *Aldy*; and he is therefore called *successor titulo lucrativo post contractum debitum*. Not only immediate, but mediate apparent heirs, may be subjected to preception. Thus, an eldest son of an eldest son incurs it, by accepting an heritable right from his grandfather; because the acceptor is, by the necessary course of law, *alioqui successurus* to the granter, though not immediately: But a right granted by one brother to another, or by a father to his daughter, does not infer it, tho' the succession should at last open to the grantee; because the granter might have afterwards had issue, which would succeed preferable to the grantee.

43. Neither of these passive titles take place, unless the subject intermeddled with or disposed be such as the intromitter or receiver would succeed to, as heir: Hence, an heir of provision, immixing with heirship moveables, or an heir of line intermeddling with, or accepting a right to subjects provided to special heirs, incurs no passive title. In this also, these two

In what these two passive titles agree;

3 D

passive

* A passive title is not inferred by acceptance of a right to moveables; because the heir is not *alioqui successurus* in moveables, Feb. 7. 1679, *Hamilton*.

in what
they dif-
fer.

passive titles agree, that the intromission in both must be after the death of the ancestor ; for there can be no *termini habiles* of a passive title, while the ancestor is alive. But, in the following respects they differ : 1. *Gestio pro haerede*, being a vicious passive title founded upon a quasi-delict, viz. intromission without the order of law, cannot be objected against the delinquent's heir, if process has not been litiscontested, while the delinquent himself was alive, 4. 1. 40. ; whereas the *successor titulo lucrativo* is, by the acceptance of the disposition, understood to have entered into a tacit contract with the granter's creditors, by which he undertakes the burden of their debts ; and all actions founded on contract are transmissible against heirs. 2. The right accepted by the *successor titulo lucrativo*, gives him an active title, whereby process of relief is competent to him against the executors of the ancestor, for such of the moveable debts as he has paid ; whereas he who behaves as heir, not being heir *active*, has, in Lord Stair's opinion, no title in strict law (though that rigour may be softened by equity, St. 3. 6. 19.) to sue for relief, either against the executors, or any other heir who may be liable before him, unless he has taken care to get an assignation from the creditor upon payment : But this does not bar him from the benefit of discussion, which is an exception or defence, and so requires no active title.

Propon-
ing defen-
ces against
the ances-
tor's debt,

44. An apparent heir, who is cited by the ancestor's creditor in a process for payment, if he offers any peremptory defence against the debt, incurs a passive title ; for he can have no interest to object against it, but in the character

rafter of heir, 11. Feb. 1713, *Lundy*. In the same manner, the heir's not renouncing upon a charge to enter heir, infers it: But the effect of both these is limited to the special debt pursued for, or charged upon; for the deeds from which such representation is inferred, being private, can operate only in favour of the special creditor at whose suit the process or charge is raised. This passive title, which is inferred from the heir's not renouncing, has no effect till decree pass against him; and even a renunciation offered after decree, if the decree be in absence, will entitle the heir to a suspension of all diligence against his person and estate, competent upon his ancestor's debts.

45. By the principles of the feudal law, an heir, when he is to complete his titles by special service, must necessarily pass over his immediate ancestor, *e. g.* his father, if he was not infest; and serve heir to that ancestor who was last velt and seised in the right, and in whose *haereditas jacens* the right must remain, till a title be connected thereto from him. As this bore hard upon creditors, who might think themselves secure in contracting with a person whom they saw for some time in the possession of an estate, and from thence conclude that it was legally vested in him, it is therefore provided, by 1695, *c.* 24. that every person, passing over his immediate ancestor who had been three years in possession, and serving heir, or succeeding by adjudication on his own bond to one more remote, shall be liable for the debts and deeds of the person interjected, to the value of the estate to which he is served. This statute being correctory of the feudal maxims, has

has been strictly interpreted, so as not to extend to the gratuitous deeds of the persons interjected, *K. 74.*; nor to the case where the interjected person was a naked fiar, and possessed only civilly, through the liferenter, 25. *June 1745, Bogle.* If an heir, in place of completing his titles, by adjudging upon his own bond, or by entering to his remote predecessor, which are the only cases expressly guarded against by the statute, shall possess the lands in the bare right of apparençy, it has been found, once and again, that the penalty of the act does not reach him, 8. *Jan. 1736, Lady Ratter.—New Coll.* 121. No. 1.; but this point is still called in question, perhaps not without some reason; for, if such a device, which is in the power of every heir, shall effectually secure against a passive title, the intention of the statute may be utterly defeated.

Reduction
by the heir
*ex capite
lecti.*

46. Our law, from its jealousy of the weakness of mankind, while under sickness, and of the importunity of friends in that conjuncture, has declared that all deeds affecting heritage, if they be granted by a person on deathbed, (*i. e.* after contracting that sickness which ends in death), to the damage of the heir, are ineffectual, *R. M. l. 2. c. 18. § 7. et seqq.* except where the debts of the granter have laid him under a necessity to alien his lands, *St. Gul. c. 13. § 2.* As this law of deathbed is founded solely in the privilege of the heir, deathbed deeds, when consented to by the heir, are not reducible, *R. M. l. 2. c. 18. § 16.* The term properly opposed to deathbed is *liege poustie*, by which is understood a state of health; and it gets that name, because persons in health have

the *legitima potestas*, or lawful power of disposing of their property at pleasure.

47. The two extremes being proved, of the grantor's sickness immediately before signing, and of his death following it, tho' at the greatest distance of time, did, by our former law, found a presumption that the deed was granted *in lecto*. St. 3. 4. 28. which could not have been elided, but by a positive proof of the grantor's convalescence; but now the allegation of deathbed is also excluded, by his having lived sixty days after signing the deed, 1696, c. 4. The legal evidence of convalescence is the grantor's having been, after the date of the deed, at kirk OR market unsupported; for a proof of either will secure the deed from challenge, 28. June 1671, cred. of *Balmerino*. The going to kirk or market must be performed when people are met together in the church, or church-yard, for any public meeting, civil or ecclesiastical, or in the market place at the time of public market, *Act S.* 29. Feb. 1692. No other proof of convalescence is receivable, because at kirk and market there are always present unsuspected witnesses, which we can hardly be sure of in any other case.

What constitutes a deathbed deed.
Deathbed excluded by convalescence; or by living 60 days after the date.

48. The privilege of setting aside deeds *ex capite lecti*, is competent to all heirs, not to heirs of line only, but of conquest, tailzie, or provision; not only to the immediate, but to remoter heirs, as soon as the succession opens to them, though the deed in dispute should not appear hurtful to the immediate heir of the grantor, K. 33. But, where it is consented to, or ratified by the immediate heir, it is secured against all challenge even from the remoter; for

To what heirs is this reduction competent?

for such consent has the effect of a *factio brevis manus* ; the dying person is considered as disposing to the heir, and he to the stranger in whose favour the deed was really granted : Yet the immediate heir cannot, by any antecedent writing, renounce his right of reduction, and thereby give strength to deeds that may be afterwards granted *in lecto* to his hurt ; for no private renunciation can authorise a person to act contrary to public law ; and such renunciation is presumed to be extorted through the fear of exheredation, 4. Dec. 1733, *Inglis*. If the heir should not use this privilege of reduction, his creditor may, by adjudication, transfer it to himself 2. 12. 3. or he may, without adjudication, reduce the deed, libelling upon his interest as creditor to the heir : But the granter's creditors, tho' their case is more favourable than that of the heir, have no right to this privilege, in regard that the law of deathbed was introduced, not in behalf of the granter himself, but of his heir, *Darl.* 110. He who is entered by precept of *clare constat*, or by hasp and staple, has an active title as heir ; and, consequently, may reduce alienations *in lecto*, of the special subjects to which he is entered.

What
rights may
be thus set
aside; even
moveable
rights ;

49. The law of deathbed strikes against dispositions of every subject to which the heir would have succeeded, or from which he would have had any benefit, had it not been so disposed. Hence the alienation, even of moveables, may be set aside where the heir has an interest ; as, 1. Of heirship moveables. 2. Of conquest provided to the heir of a marriage, tho' the subject of it should be moveable, *K.* 32. 3. An heir may reduce the assignation of a moveable

moveable subject, granted by his ancestor, where the moveable estate of the deceased is not sufficient for his moveable debts; that so the moveable estate may be enlarged, and the heritage saved from the diligence of personal creditors, 22. *July 1707, Cowie*. Deathbed deeds granted in consequence of a full or proper obligation in *liege poustie*, are not subject to reduction; but, where the antecedent obligation is merely natural, they are reducible, *K.* 27. By stronger reason, the deceased cannot, by a deed merely voluntary, alter the nature of his estate on deathbed to the prejudice of his heir, so as from heritable to make it moveable; but, if he should, in *liege poustie*, exclude his apparent heir, by an irrevocable deed containing reserved faculties, the heir cannot be heard to quarrel the exercise of these faculties on deathbed; since he loses the character of heir, by the irrevocable deed divesting the disponent, and so has no interest to reduce any posterior deed.

but not
deeds
granted
in conse-
quence of
a prior o-
bligation.

50. The proper method for affecting the heritable estate of a person deceased, either for his own debt, or for that of his heir, has been explained, 2. 12. 5. In a competition between the creditors of the deceased and of the heir, the Roman law, *l. 1. § 1. de separ.*; and, after their example, ours, 1661, *c. 24.* has justly preferred the creditors of the deceased, as every man's estate ought to be liable, in the first place, for his own debt. But this preference is, by the statute, limited to the case where the creditors of the deceased have used diligence against their debtor's estate, within three years from his death; and therefore the heir's creditors

Competi-
tion be-
tween the
creditors
of the de-
ceased and
of the heir.

ditors may, after that period, affect it for their own payment. By a subsequent branch of this act, all dispositions by an heir of the ancestor's estate, within a year after his death, are null, in so far as they are hurtful to the creditors of the ancestor. This takes place, though these creditors should have used no diligence, *Falc. vol. 1. 219.*; and even where the dispositions are granted after the year, they seem, by the first part of the act, to be ineffectual against the creditors of the deceased, who have used diligence within the three years. This act appears, from its whole tenor, to relate only to heritage, 17. *June 1712, Ker*, and so is improperly made by Mr *Forbes*, the ground of a decision concerning moveables, 9. *Feb. 1711, Graham*, especially after the act 1695, c. 41.; see *Bankt. 3. 35. 3.*

TIT. 9. Of Succession in Moveables.

Rules of
moveable
succession
by law.

IN the succession of moveable rights, it is an universal rule, that the next in degree to the deceased (or next of kin) succeeds to the whole; and if there are two or more equally near, all of them succeed by equal parts, without that prerogative, which takes place in heritage, of the eldest son over the younger, or males over females. Neither does the right of representation, explained 3. 8. 4. obtain in the succession of moveables, except in the single case of a competition between the full blood and the half blood; for a niece by the full blood will

be

be preferred before a brother by the half blood, tho' she is by one degree more remote from the deceased than her uncle. Where the estate of a person deceased consists partly of heritage, and partly of moveables, the heir in the heritage has no share of the moveables, if there are others as near in degree to the deceased as himself: But where the heir, in such case, finds it his interest to renounce his exclusive claim to the heritage, and betake himself to his right as one of the next of kin, he may collate or communicate the heritage with the others, who, in their turn, must collate the moveables with him; so that the whole is thrown into one mass, and divided equally among all of them. This doctrine holds, not only in the line of descendants, but of collaterals, 1743, *Chancellor*: for it was introduced, that the heir might in no case fare worse than the other next of kin.

Collation
by the
heir.

2. One may settle his moveable estate upon whom he pleases, excluding the legal successor, by a testament; which is a written declaration, of what a person wills to be done with his moveable estate, after his death. No testamentary deed is effectual, till the death of the testator, who may therefore revoke it at pleasure, or make a new one, by which the first loses its force; and hence testaments are called, last or latter wills. Testaments, in their strict acceptation, must contain a nomination of executors, *i. e.* of persons appointed to administer the succession according to the will of the deceased: Yet nothing hinders one from making a settlement of moveables, in favour of an universal legatee, tho' he should not have

Succession
in move-
ables by
destina-
tion.
Testa-
ment.

Execu-
tors.

A stranger named executor, is accountable to the next of kin.

Nuncupative testament.

Legacy,

not due till the granter's death.

Legatum rei alienae.

appointed executors; and, on the other part, a testament where executors are appointed, is valid, tho' the person, who is to have the right of succession, should not be named. In this last case, if the executor nominated be a stranger; *i. e.* one who has no legal interest in the moveable estate, he is merely a trustee, accountable to the next of kin; but he may retain a third of the dead's part, (explained § 6.), for his trouble in executing the testament; in payment of which legacies, if any be left to him, must be imputed, 1617, *c.* 14. The heir, if he be named executor, has right to the third as a stranger; but if one be named, who has an interest in the legal succession, he has no allowance, unless such interest be less than a third. Nuncupative or verbal testaments are not, by the law of Scotland, effectual for supporting the nomination of an executor, let the subject of the succession be ever so small: But verbal legacies, not exceeding *L.* 100 *Scots*, are sustained; and even where they are granted for more, they are ineffectual, only as to the excess, 7. *July* 1629, *Wallace* *.

3. A legacy is a donation by the deceased, to be paid by the executor to the legatee. It may be granted, either in the testament, or in a separate writing. Legacies are not due till the granter's death; and consequently they can transmit no right to the executors [of the legatee, in the event that the granter survives him]. By the Roman law, if one bequeathed a subject, knowing that it was not his own, the heir

* The testator's verbal will with regard to his moveables, declared to the executor and acknowledged by him, is obligatory upon him, in its utmost extent, *Home* No. 9.

must either have purchased it for the legatee, or paid him the value; for otherwise the legacy could have no effect. Where the testator *rei alienae* believed the subject to belong to himself, which is *in dubio*, to be presumed, neither the thing nor its value could be claimed; because it was not to be supposed he would have burthened his heir, if he had known that the subject had belonged to another, § 4. *inst. de legat.* These rules hold also by the usage of Scotland, 16. June 1664, *Murray*,—24. June 1664, *Falconer*; and they are justly extended even to legacies of subjects which truly belonged to the testator, but which are not transmissible by testament. Thus the legacy of an heritable bond due to the testator himself, which he could not but know was heritable, and consequently not deviseable by testament, falls, by our practice, under the rule of legacies *rei alienae scienter legatae*, 2. Dec. 1674, *Cranston*.—*Fals.* 19. July 1745, *Paterfon*; because the reason of the rule is equally applicable to both. There is this separate ground why the legacy of an heritable bond, left in a testament, in which the testator's heir is named executor, and universal legatary, cannot be questioned by the executor, namely that he ought not to take the benefit of the testament as executor; and at the same time, in the character of heir, decline making payment to the legatee of the special heritable bond bequeathed to him by that testament. Where a moveable bond is bequeathed, for which the testator has afterwards taken an heritable security, his altering the nature of the subject imports a revocation of the legacy, 8. July 1073, *Edmonston*.

Legacy
of an he-
ritable
bond.

4. Legacies, where they are general, *i. e.* General
of legacy.

Special
legacy
confers a
jus in re;

and is not
subject to
abate-
ment,
from defi-
ciencies.

Who can
test?

of a certain sum of money indefinitely, give the legatee no right in any one debt or subject; he can only insist in a personal action against the executor for payment out of the testator's effects. A special legacy, *i. e.* of a particular debt due to the deceased, or of a particular subject belonging to him, is of the nature of an assignation, by which the property of the special debt or subject vests, upon the testator's death, in the legatee, who can therefore directly sue the debtor or possessor: Yet, as no legacy can be claimed till the debts are paid, the executor must be cited in such process, that it may be known whether there are free effects sufficient for answering the legacy. Where there is not enough for payment of all the legacies, each of the general legatees must suffer a proportional abatement: But a special legatee gets his legacy entire, tho' there should be nothing over for payment of the rest; and, on the contrary, he has no claim, if the debt or subject bequeathed should perish, whatever the extent of the free executry may be.

5. Minors, after puberty, can test without their curators, wives without their husbands and persons interdicted without their interditors; but bastards cannot test, except in the cases afterwards set forth, 3. 10. 3. As a certain share of the goods, falling under the communion that is consequent on marriage, belongs, upon the husband's decease, to his widow *jure relictae*, and a certain share to the children called the legitime, portion natural, or bairn part of gear; one who has a wife or children tho' he be the absolute administrator of all the

goo

goods during his life, and consequently may alien them by a deed *inter vivos* in *liege poustie*, even gratuitously, if no fraudulent intention to disappoint the wife or children shall appear, 1. 6. 7.; yet cannot impair their shares gratuitously on deathbed; see *Dirlet. Doubts, voce Legitima liberorum*; nor can he dispose of his moveables to their prejudice by testament, tho' it should be made in *liege poustie*; since testaments do not operate till the death of the testator, at which period the division of the goods in communion have their full effect in favour of the widow and children.

One cannot alien in *lecto*, or test in prejudice of the legit or legitime.

6. If a person deceased leaves a widow, but no child, his testament, or, in other words, the goods in communion, divide in two; one half goes to the widow, the other is the dead's part, *i. e.* the absolute property of the deceased, on which he can test, and which falls to his next of kin, if he dies intestate. Where he leaves children, one or more, but no widow, the children get one half as their legitime; the other half is the dead's part, which falls also to the children, if the father has not tested upon it. If he leaves both widow and children, the division is tripartite; the wife takes one third by herself, another falls, as legitime to the children, equally among them, or even to an only child, tho' he should succeed to the heritage, 12. *Jan.* 1681, *Trotter*; the remaining third is the dead's part. Where the wife predeceases without children, one half is retained by the husband, the other falls to her next of kin: Where she leaves children, the division ought also to be bipartite, by the common rules of society, since no legitime is truly due on a mother's death;

Division of a testament, in case of a widow or children;

in case of the wife's predecease.

death; yet it is in practice tripartite; two thirds remain with the surviving father, as if one third were due to him *proprio nomine*, and another as administrator of the legitime for his children; the remaining third, being the wife's share, goes to her children, whether of that or any former marriage, for they are all equally her next of kin.

What debts affect the whole executry;

and what affect only the dead's part.

What children are entitled to the legitime.

7. Before a testament can be divided, the debts owing by the deceased are to be deducted; for all executry must be free. As the husband has the full power of burdening the goods in communion, his debts affect the whole, and so lessen the legitime and the share of the relict, as well as the dead's part. His funeral charges, and the mournings and alimony due to the widow, are considered as his proper debts, 20. *June 1713, Moncrieff*; but the legacies, or other gratuitous rights, granted by him on death-bed, affect only the dead's part. Bonds bearing interest, due by the deceased, cannot diminish the relict's share, because such bonds, when due to the deceased, do not increase it, 1661, c. 32. The funeral charges of the wife predeceasing, fall wholly on her executors, who have right to her share. Where the deceased leaves no family, neither husband, wife, nor child, the testament suffers no division, but all is the dead's part.

8. The whole issue of the husband, not only by that marriage which was dissolved by his death, but by any former marriage, has an equal interest in the legitime; otherwise the children of the first marriage would be cut out, as they could not claim the legitime during their father's life. But no legitime is due, 1.

Upon

Upon the death of a mother. 2. Neither is it due to grand children, upon the death of a grandfather; perhaps, because the immediate father is presumed to have renounced that right before his death, upon receiving his just share of the effects of the deceased. Nor, 3. To children foris-familiated, *i. e.* to such as, by having renounced the legitime, are no longer considered as *in familia*, and so are excluded from any farther share of the moveable estate than they have already received.

9. As the right of legitime is strongly founded in nature, the renunciation of it is not to be inferred by implication; neither by the child's carrying on an employment by himself, Renunci-
ation of
the legi-
time, how
inferred; nor by his marriage, nor even by his excepting a provision from his father, unless it specially bear to be in satisfaction of the legitime. Re-its effects. nunciation by a child, of his claim of legitime, has the same effect as his death, in favour of the other children entitled thereto; and consequently the share of the renouncer divides amongst the rest; but he does not thereby lose his right to the dead's part, if he does not also renounce his share in the father's executry; see *Anon.* 101. Nay, his renunciation of the legitime, where he is only the younger child, has the effect to convert the whole subject thereof into dead's part, which will therefore fall to the renouncer himself as next of kin, if the heir be not willing to collate the heritage with him, *Falc.* 2. 62.

10. For preserving an equality among all the children, who continue entitled to the legitime, we have adopted the Roman doctrine of Collation
among the
younger
children; *collatio bonorum*; whereby the child, who has
got

in what
cases ex-
cluded.

got a provision from his father, is obliged to collate it with the others, and impute it towards his own share of the legitime; but if, from the deed of provision, the father shall appear to have intended it as a *praecipuum* to the child, collation is excluded. This intention was presumed, from a clause, that the child was to continue a bairn in the house, 10. Nov. 1787, *Beg.* A child is not bound to collate an heritable subject provided to him, because the legitime is not impaired by such provision, 14. Feb. 1677, D. *Buccleugh.* As this collation takes place only in questions among children who are entitled to the legitime, the relict is not bound to collate donations given her by her husband, in order to increase the legitime; and, on the other part, the children are not obliged to collate their provisions, in order to increase her share.

Confirma-
tion.

11. As an heir in heritage must complete his titles by entry, so an executor is not vested in the right of the moveable estate of the deceased, without confirmation; which therefore is called, by some lawyers, tho' improperly, the *aditio hereditatis in mobilibus*. Confirmation is a sentence of the Commissary or Bishop's court, empowering an executor, one or more, upon making inventory of the moveables pertaining to the deceased, to recover, possess, and administer them, either in behalf of themselves, or of others interested therein. The Bishop was, in all confirmations, entitled to the twentieth part of the moveables, called the quot of the testament, which was anciently computed, without deduction of debts. Quots were first prohibited, during the usurpation, by

Quot of
testa-
ments.

1641, c. 61. which act was revived by 1661, c. 28.: They were soon thereafter restored, 1669, c. 19. with this restriction, that they should be paid out of the free gear, *deductis debitis*; and now they are again prohibited, 1701, c. 14. without prejudice to the dues of court payable at confirmation. Testaments must be confirmed in the commissariat where the deceased had his principal dwelling-house at his death. 7. *Before what commissariat must the testament be confirmed.* Feb. 1672, Commiss. of Edinburgh, — *New Coll.* 57. If he had no fixed residence, or died in a foreign country, the confirmation must be at Edinburgh, as the *commune forum*; but if he went abroad with an intention to return, the commissariat within which he resided, before he left Scotland, is the only proper court, 1426, c. 89.

12. Confirmation proceeds upon an edict, which is affixed on the door of the parish-church where the deceased dwelt, and serves to intimate to all concerned, the day of confirmation, which must be nine days at least after publishing the edict. In a competition for the office of executor, the Commissary prefers, *primo loco*, the person named to it by the deceased himself, whose nomination he ratifies; or confirms, without any previous decerniture; this is called the confirmation of a testamentary. In default of an executor named by the deceased, universal disponees are, by the present practice, preferred, *New Coll.* 25.; after them, the next of kin, then the relict, then creditors, and lastly, special legatees. All these must be decerned executors, by a sentence called a decree dative; and, if afterwards they incline to confirm, the Commissary au-

Form of confirmation.

Confirmation of a testamentary;

of a testamentary dative.

thorises them to administer, upon their making inventory, and giving security to make the subject thereof forthcoming to all having interest; which is called the confirmation of a testament dative.

Confirmation must be upon inventory.

General letters, charging to confirm, are now discharged.

The creditor of the deceased may cite the executor, or may himself confirm.

13. Executors were, by our ancient practice, obliged to confirm the whole moveable estate of the deceased, and for that end it behooved them to give up the inventory on oath, *Cr. 348. § 2.—Hope Min. Pr. p. 25.* and, if any new subject came afterwards to their knowledge, they were allowed to add it to the principal testament; but now the Commissaries must admit whatever inventories are offered, *New Coll. 88.* Where no person applied for the office, the Bishop, that he might be secured of his quot, could, by our former practice, charge all having interest to confirm, upon general letters of horning; and if there was no appearance, he preferred to the office his own procurator-fiscal, who was thereby entitled to the whole dead's part, till one having an interest claimed the office, who was of course decerned executor surrogate, *i. e.* executor in his room; but all charges to confirm are now prohibited except at the suit of the widow, children, or others having interest, by 1690, *c. 26.*

14. A creditor, whose debtor's testament is already confirmed, may sue the executor, who holds the office for all concerned, to make payment of his debt. Where there is no confirmation, he himself may apply for the office and confirm as executor-creditor; which entitles him to sue for, and receive the subject confirmed, for his own payment: And, when one applies for a confirmation, as executor-creditor

ditor, every co-creditor may apply to be conjoined with him in the office. As this kind of confirmation is simply a form of diligence, creditors are, by *Act S. 14. Nov. 1679.* exempted from the necessity of confirming more than the amount of their debts.

15. A creditor, whose debt has not been A creditor in a constituted, or his claim not closed by decree, debt not constituted, may during the life of his debtor, has no title to demand directly the office of executor *qua* creditor; but he may charge the next of kin who stands off, to confirm, who must either renounce the next of kin to confirm, within twenty days after the charge, or be liable for the debt; and, if the next of kin renounces, the pursuer may constitute his debt, and obtain a decree *cognitionis causa*, against the *hereditas jacens* of the moveables, upon which he may confirm, as executor-creditor to the deceased, 1695, c. 41. Where one is creditor, not to his deceased, but to the next of kin who stands off from confirming, he may, by the same statute, affect the moveables of the deceased, either by requiring the procurator-fiscal to confirm and assign to him, or by obtaining himself decerned executor dative to the deceased, as if he were creditor to him, and not to his next of kin. A creditor to the next of kin; how he may recover his debt.

16. Where an executor has either omitted Confirmation *ad omiffa vel male appretiatata.* to give up any of the effects belonging to the deceased in inventory, or has estimated them below their just value, there is place for a new confirmation, *ad omiffa vel male appretiatata*, at the suit of any having interest. The estimate put on the executry-goods, by the deceased himself, however low, must stand good as to the dead's part, over which he has full power. In

In this
sort, the
first exe-
cutor
must be
cited.

In this confirmation, the executor in the principal testament must be cited, because it has the effect to exclude him from a part of the administration to which his office entitles him; and, if it appears that he has not omitted or undervalued any subject *dolose*, the Commissary, in place of naming a new executor, will ordain the subjects omitted, or the difference between the estimations in the principal testament and the true values, to be added thereto; but, if *dole* shall be presumed, the whole subject of the testament *ad omiffa vel male appretiata*, will be carried to him who confirms it, to the exclusion of the executor in the principal testament, *F. 16. Feb. 1703, Robertsons.*

Executry
is not de-
scendible
to heirs.

17. Executry, being an office, is not descendible to heirs: Where, therefore, there is but one executor, the office dies with himself; if there are two, or more, it accrues to the survivors. Where all the executors happened to die, while any part of the testament remained not executed, *i. e.* before they had obtained possession, payment, decree, or new security for the debts in their own name, an executor might, by our former practice, have been named *ad non executi*: But now, for near a century, confirmations *ad non executi* have been seldom used; for, wherever a testament is confirmed for the executor's own behoof, *e. g.* by the next of kin, or by an executor-creditor for his own payment, such confirmation is adjudged to have the effect of an assignation, or procuratory *in rem suam*; whereby the full right of the subjects confirmed, and consequently the right of execution, is transmitted to the representative

Executors
*ad non
executa.*

tives of the person confirming, 12. Feb. 1662, Bells,—23. June 1737, Mitchel.

18. The legitime and relict's share, because they are rights arising *ex lege*, in consequence of the communion of goods, and of the natural obligation upon fathers to give a certain portion of their estates to their issue, operate *ipso jure*, upon the father's death, in favour of the relict and children; and consequently pass from them, though they should die before confirmation, to their next of kin:

Whereas the dead's part, which falls to the children or other next of kin in the way of succession, remains, if they should die before confirming, *in bonis* of the first deceased; and so does not descend to their next of kin, but may be confirmed by the person who, at the time of confirmation, is the next of kin to the first deceased. Special assignments, though neither intimated, nor made public, during the life of the granter, carry to the assignee the full right of the subjects assigned, without confirmation, 1690, c. 26. Special legacies are really assignments, and so fall under this statute, Jan. 1729, Gordon.—The next of kin, by the bare possession of the *ipsa corpora* of moveables, acquires the property thereof without confirmation, and transmits it to his executors, 14. Nov. 1744, Macwhirter*.

Legitime and relict's part transmit without confirmation.

The dead's part does not.

Special assignments and legacies need not be confirmed.

Possession of moveables, equal to confirm.

19. The confirmation of any one subject by the next of kin, as it proves his right of blood, has been, by our later decisions, adjudged to carry the whole executory out of the testament of the deceased, even what was omitted; and to transmit all to his own executors, 23. Jan. 1745,

Partial confirmation of the next of kin transmits the whole.

* See Kames's Elucidations, p. 114.

License
to pursue
before
confirma-
tion.

1745, Executors of *Murray*. The confirmation of a stranger, who is executor nominated, as it is merely a trust for the next of kin, has the effect to establish the right of the next of kin to the subjects confirmed, in the same manner as if himself had confirmed them. As executor decerned, who is not willing to put himself to the expence of confirming doubtful debts, may, even before confirmation, sue the debtors of the deceased, if he gets a license from the Commissary for that purpose: But such licenses being intended only for saving expence, where there is a danger of getting nothing, are granted, *excludendo sententiam*; and, therefore, if the executor shall, before confirmation, take decree for the debt, the decree is null. Diligence used by an executor upon a license falls, if he should die before confirmation, since the license is merely a personal permission, which dies with the person licensed,

Executors
hold the
office *pro*
indiviso.

After exe-
cution,
the sub-
jects di-
vide a-
mong
them.

30. June 1705, *Jackson*.

20. Where there are two or more executors, they hold the office *pro indiviso*, or as one person: All of them must therefore concur in suing the debtors of the deceased, 8. March 1634,—*contra*, L. Lag, and if any one shall refuse to concur, he may be excluded from the office, at the suit of the co-executors; but, after a debt comes to be established in their person by decree, each executor may, by himself, sue for his particular share thereof; and the debtor may safely make payment to him of such share,

17. March 1630, *Semple*. Yet a debtor to the executry ought not to make payment of any part of his debt to an *executor-creditor*, without concurrence of the other executors; because the

the right of an executor-creditor depends entirely on the lawfulness of his debt, which the co-executors have an interest to inquire into, before payment, 7. Nov. 1738, *Inglis*. As all the co-executors have an equal right in debts due to the deceased, they are liable only *pro rata* in debts due by him, unless it shall appear, that he who is sued has by himself intermeddled with as much of the executry-effects, as the debt sued for amounts to, 22. July 1630, *Salmon*.

Co-executors are liable only *pro rata*.

21. Executry, tho' it be sometimes said to carry a certain degree of representation of the deceased, is properly an office: Executors therefore are not subjected to the debts due by the deceased, beyond the value of the inventory; but, at the same time, they are liable in diligence for making the inventory effectual to all having interest. A decree and registered horning is held to be sufficient diligence against debtors. An executor-creditor who confirms more than his debt amounts to, is liable in diligence for what he confirms; see

Executors are not liable *ultra vires inventarii*.

Diligence prestable by executors.

Ad S. 14. Nov. 1679. Executors are not liable in interest, even upon such bonds recovered by them as carried interest to the deceased, 23. Jan. 1747, *E. Roseberry*; see *Falc.* vol. 1. 177. because their office obliges them to retain the sums they have made effectual, in order to a distribution thereof, among all having interest. And, on the same principle, though an executor should put out the executory-money, after it is in his hands, at interest, he is not liable in interest; for, as by his office, he ought to have retained the moneys he lends on his own risk, and consequently is entitled to the whole profits, July 1730, creditors of *Thomson*.

Executors whether liable for interest.

Execu-
tors are
trustees
for all
having
interest.

22. Since executors are trustees for all who have interest in the executry, they cannot, even after the debts due to the deceased are established in their own person, assign them to the damage of those concerned; nor can the effects of the decease fall under the executor's escheat, farther than the executor's proper interest reaches, 21. Dec. 1671, *Gordon*. On the same ground, the creditors of the deceased may affect, by diligence, not only the original subjects confirmed in the testament, but even bonds taken payable to the executor himself, if they were granted as the value of executry-goods; and hence also an executor must communicate, to all having interest in the executry, the benefit of the eases got in transacting the debts acquired by him after confirmation, from which period he became their common trustee, 4 June 1747, *Mackenzie*.

Execu-
tors may
pay *primo*
venienti.

Privile-
ged debts
may be
paid
without
sentence.

And debts
due to
the ex-
ecutor
himself.

23. As there was no method to come at the knowledge of all the personal creditors of a person deceased, executors might, at first, have paid *primo venienti*, to that creditor who first obtained a sentence; but, being judicial trustees, they could not pay any debt without the authority of a sentence, except those called privileged, which always were, and still continue preferable to every other debt. Under that name are comprehended, medicines furnished to the deceased on deathbed, physicians fees during that period, funeral charges, which include whatever is necessary for the decent performance of the funeral, *New Coll.* 57. and the rent of his house, and his servant's wages, for the year or term current at his death. The executor might, by our former law, have also retained

retained the executry-effects, for the payment of his own debts, 26. Jan. 1628, *Adie*, even tho' he had obtained no warrant from the commissary to retain: And he could have paid the debts which were acknowledged by the deceased himself in his testament, without sentence; if, before payment, he was not interpellated by another creditor 31. March, 1624, *L. Currybill*. But by *A7 S* 28. Feb 1662, all creditors, who either obtain themselves confirmed, or who cite the executor already confirmed, within six months after their debtor's death, are preferred. *pari passu*, with those who have done more timely diligence: Since which act, no executor can either retain for his own debt, or pay a testamentary debt, so as to exclude any creditor, who shall use diligence within the six months, from the benefit of the *pari passu* preference; neither can a decree for payment of debt be obtained, in that period, against an executor; because, till that term be elapsed, it cannot be known how many creditors may be admitted to the fund in his hands. If no diligence be used within six months, the executor may, as at first, retain for his own debt, and pay the residue *primo venienti*; but if, before actual payment upon a decree, another creditor should interpel him by a citation, the executor must call both, in an action of multiplicity, that the last may have an opportunity of objecting to the other's ground of debt or diligence, 16. Dec. 1629, *White*: and he can make no payment, even on decree, without bringing into the field the testamentary creditors, because he is interpellated as to these the testament, which is his own title, 8.

And testamentary debts.

Pari passu preference by act of sederunt.

Executor cannot pay, even on decree, if interpellated.

March 1631, Duff. In a competition between diligences used after the six months, the preference was formerly governed by the priority of the citations, *July 1723, Sir Ja. Gray.* But, by the later practice, the first citation founds no preference by itself, *15. Feb. 1738, Graeme.* Such creditors of the deceased as have used diligence within a year after their debtor's death, are preferable on the subject of his testament to the creditors of his next of kin; but, after that period, these postponed creditors have access to it, in terms of the act *1695. c. 41.*

Priority of citation after the 6 months gives no preference.

Creditors of the next of kin.

Exoneration of executors.

24. Executors who wanted to be discharged of their trust, and to have their accounts settled, insisted, by the old practice, for decrees of exoneration before the commissaries, which contained a particular inventory of the funds belonging to the deceased, and how they were applied, *St. 3. 8. 75.* But this action is now disused; and executors, when they are sued by creditors before the judge competent, are admitted to plead, by way of exception, that the inventory is exhausted by lawful payments. If there are any debts due to the deceased, which the executor has not been able to recover from the debtors, he will be exonerated as to these, by producing to the court, decrees and registered hornings; and by granting assignations thereof to the creditors on the executry, according to their several preferences, that they may sue for payment in their own names.

Passive title of vitious intromission;

25. The only passive title in moveables vitious intromission, which may be defined, unwarrantable intermeddling with the moveable estate of a person deceased, without the

der of law. This is not confined, as the passive against titles in heritage are, to the persons interested whom it in the succession, but strikes against all intro-mittors; because even strangers, when attending on dying persons, have frequent opportunities of intermeddling with moveables, which are more easily abstracted than heritage. The bare intermeddling infers this passive title, from tho' the thing intermeddled with should not be applied to any use by the intromittor, 29. what acts it is inferred.

June 1705, Archibald. Where an executor confirmed, intermeddles with more than he has confirmed, he incurs a passive title; fraud being, in the common case, presumed, from his not giving up in inventory the full subject intermeddled with, 13. *Dec. 1709, Drummond.* Vicious intromission is presumed, by *Act S. 23.* *Presumed Feb. 1692,* in the special case where the repositories of a dying person are not sealed up, as soon as he becomes incapable of sense, by his nearest relations; or, if he dies in a house not his own, they must be sealed by the master of such house, and the keys delivered to the judge-ordinary, to be kept by him, for the benefit of all having interest.

26. The passive title of vicious intromission, takes no place, 1. Where the subject intermeddled with was truly no part of the estate of the deceased, or ceased to be such before the intromission, e. g. where the goods of one who died at the horn are vested in a donatary; or where there is an executor confirmed: For, in these cases, the intromittor is only accountable to the donatary or executor, whose goods they are by the declarator or confirmation. By special statute, 1696, c. 20. the confirmation of

in intro-
mission on
a probable
title ;

in intro-
mission,
*custodiae
causa.*

Vitiosity
purged
by confir-
mation.

an executor creditor because it is no more than a step of diligence, does not screen a third party intermeddling, from the passive title, unless he claims under the creditor confirmed ; but tho' he should derive no right from the creditor, he seems to be secured by the last words of the act, if his intromission has been with the special subject confirmed. 2. It is excluded by any probable title, or by any circumstance that takes off the presumption of fraud ; e. g. by a general disposition of moveables. tho' that is of itself an incomplete right without confirmation, 12. *July 1666. Scot* ; or by the title of sale, tho' the subject sold had truly belonged to the deceased, and not to the seller ; or by the small value of the thing intermeddled with, 22. *Jan. 1713, Stark.* In consequence of this rule, necessary intromission, or *custodiae causa*, by the wife or children, who only continue the possession of the deceased, in order to preserve his goods for the benefit of all concerned, infers no passive title.

27. Upon the same principle, an intromittor, by confirming himself executor, and thereby by subjecting himself to account, before action be brought against him on the passive titles, purges, or takes off the vitiosity of his prior intromission : And where the intromittor is one who is interested in the succession, e. g. a relic or next of kin, his confirmation, at any time within a year from the death of the deceased will exclude the passive title, notwithstanding a prior citation, 13. *Dec. 1709, Drummond.* As this passive title was intended only for the security of creditors, it cannot be sued upon by legatees ; and since it arises *ex delicto*, it cannot be pleaded against the heir of the intromittor

As in delicts, any one of many delinquents may be subjected to the whole punishment, so any one of many intromittors may be sued *in solidum* for the pursuer's debt, without calling the rest; but the intromittor who pays, has an action of relief against the others for their share of it; for as all the penalties of vicious intromission are introduced solely in favour of creditors, he must, in a question with third parties, be considered as having done no wrong to them; and more especially in a question with those who were his fellow intromittors. If the intromittors are sued jointly, they are liable, not *pro rata* of their several intromissions, but *pro virili*, 16. Nov. 1626, *Chalmers*.

28. The whole of a debtor's estate is subjected to the payment of his debts; and, therefore, both his heirs and executors are liable for them, in a question with creditors; but as succession is by law divided into the heritable and the moveable estate, each of these ought, in a question between the several successors, to bear the burdens which naturally affect it. Action of relief is accordingly given, by 1503, c. 76. to the heir who has paid a moveable debt, against the executor; and tho' the statute enacts nothing concerning a relief to the executor against the heir for heritable debts, practice has *ex paritate rationis*, extended it to that case, 7. March 1629, *Falconer*. This relief is not cut off, by the deceased's having disposed, either his land-estate or his moveables, with the burden of his whole debts; for such burden is not to be construed as an alteration of the legal succession, but merely as a farther security to creditors, see *Falc.* 1. 185. unless the contrary shall

Vicious
intromit-
tors have
no relief
against
each o-
ther.

Mutual
relief be-
twixt the
heir and
executor.

shall be presumed from the special style of the disposition.

TIT. 10. Of last Heirs and Bastards.

Where
there is
no heir,
the King
succeeds.

BY our ancient practice, feudal grants taken to the vassal and to a special order of heirs, without settling the last termination upon *heirs whatsoever*, returned to the superior, upon failure of the special heirs therein contained. *Cr.* 251. § 11.—*Dirl and Stewart, V. Limitation*; but now that feus are become patrimonial rights, the superior is, by the general opinion, held to be fully divested by such grant, and the right descends to the vassal's heirs at law. And even where a vassal dies, without leaving any heir who can prove the remotest propinquity to him, it is not the superior, as the old law stood, *R. M. l. 2 c. 55. § 1. 2.* but the King, who succeeds as last heir, both in the heritable and moveable estate of the deceased, in consequence of the rule, *quod nullius est, cedit domino Regi.*

King's
right,
where the
lands
hold of
himself;

where
they hold
of a sub-
ject.

2. If the lands, to which the king succeeds, be holden immediately of himself, the property is consolidated with the superiority, as it resignation had been made in the Sovereign's hands. If they are holden of a subject, the King, who cannot be vassal to his own subject, names a donatary, who, to complete his title, must obtain decree of declarator, in which a general citation against all and sundry is sufficient, 31. *July 1666, Crawford, and thereaf-*

ter he is presented to the superior, by letters of presentation from the King under the quarter-seal, in which the superior is charged to enter the donatary to the lands, with all the right's competent to the former vassal. The whole estate of the deceased is, in this case, subjected to his debts, and to the widow's legal provisions, 7. *July 1629, Wallace*; and may therefore be affected, either by the adjudication or confirmation of creditors, according to the nature of the right: But, in the carrying on of such diligence, the officers of state, and the donatary, must be cited as parties. Neither the King nor his donatary is liable, beyond the value of the succession. A person who has no heir to succeed to him, cannot alien his heritage *in lecto*, to the prejudice of the King, who is entitled to set aside such deed, in the character of *ultimus heres*, *New Coll.* 86.

3. A bastard can have no legal heirs, except The King those of his own body; since there is no succession but by the father, and a bastard has no certain father. The King, therefore, succeeds to him, failing his lawfull issue, as last heir. Tho' the bastard, as absolute proprietor of his own estate, can dispose of his heritage in *liege poultie*, and of his moveables by any deed *inter vivos*, 20. *July 1739, Ewing*, yet he is disabled, *ex defectu natalium*, from bequeathing by testament, without letters of legitimation from the Sovereign, 18. *June 1678, Commissioners of Berwickshire*. If the bastard has lawfull children, he may test, without such letters, and name tutors and curators to his issue, 8. *March 1628, Muir*; for, in such case, the King can have no interest to object, the bastard's children

The King succeeds as *ultimus heres* to the bastard. Bastards cannot test without letters of legitimation; unless they have lawfull issue.

Effects of letters of legitimation. Children being his lawful heirs. Letters of legitimation, let their clauses be ever so strong, cannot enable the bastard to succeed to his natural father, to the exclusion of lawful heirs; for the King cannot, by any prerogative, cut off the private right of third parties: But he may, by a special clause in letters of legitimation, renounce his right to the bastard's succession, failing his descendants, in favour of him who would have been the bastard's heir, had he been born in lawful marriage; seeing such renunciation encroaches upon no right competent to any third party, *New Coll.* 2 79.

Impediments to succession.

Bastards incapable of legal succession;

4. The legal rights of succession, being founded in marriage, can be claimed only by those who are born in lawful marriage; the issue therefore of an unlawful marriage are incapable of succession. Marriage entered into, after divorce for adultery, between the persons guilty, is declared unlawful, and their issue incapable of succeeding, by 1600, c. 20. A bastard is not only excluded, 1. From his father's succession, because law knows no father, who is not marked out by marriage; and, 2. From all heritable succession, whether by the father or mother; because he cannot be pronounced lawful heir by the inquest, in terms of the brief; but also, 3. From the moveable succession of his mother; for, tho' the mother be known, the bastard is not her lawful child, and legitimacy is implied in all succession deferred by law: And, if a bastard might be deemed executor as next of kin to his mother, he would, by consequence, be entitled to an equal share of her moveable succession, with any of her lawful children. A bastard, though he cannot

cannot succeed *jure sanguinis*, may succeed by but not of destination, where he is specially called to the succession by destination, by an entail or testament.

5. Certain persons, tho' born in lawful marriage, are declared incapable of succession by statute. The director of the chancery was, by 1609, c. 4. prohibited to issue precepts on retour, in favour of persons excommunicated; and subject superiors were left at liberty to refuse brieves, and precepts of *clare constat*, in their favour; but these penalties are now taken off by 1690, c. 28. Aliens are, from their allegiance to a foreign prince, incapable of succeeding in feudal rights, without naturalization, *Falc.* 2. 66. ; see 1558, c. 65. 66. —1669, c. 7. That part of these statutes, which supposes them also incapable of moveable succession, though it obtains, at this day, in some other countries, is not in force with us. Children born in a foreign state, whose fathers were natural born subjects and not attainted, are declared natural born subjects, by 4. *Geo.* II. c. 21. Persons educated in, or professing the Popish religion, if they shall neglect, upon their attaining the age of fifteen, to renounce its doctrines by signed declaration, cannot succeed in heritage; but must give place to the next Protestant heir, who will hold the estate irredeemably, if the Popish heir does not, within ten years after incurring the irritancy, sign the *formula* prescribed by the statute 1700,

nor papists.

B O O K IV

TIT. I. *Of Actions.*

Actions,

HITHERTO of *persons* and *rights*, the two first objects of law; *actions* are its third object, whereby persons make their rights effectual. An action may be defined, a demand regularly made and insisted in, before the judge competent, for the attaining or recovering of a right; and it suffers several divisions, according to the different natures of the rights pursued upon.

real and
personal.

2. Actions are either real or personal. A real action is that which arises from a right in the thing itself, and which therefore may be directed against all possessors of that thing: Thus, an action for the recovery, even of a moveable subject, when founded on a *jus in re*, is in the proper acceptation real; but real actions are, in vulgar speech, confined to such as are directed against heritable subjects. A personal action is founded only on an obligation undertaken for the performance of some fact, or the delivery of some subject; and therefore can be carried on against no other than the person obliged, or his heirs. Both rights are included in an indentment of annualrent, which contains not only a personal obligation on the granter to pay, but a right of hypothec in the subject itself, and therefore the creditor can either sue the granter, or his representatives, in a personal action; or he may, for his payment, insist in

re

real action of poinding the ground, against the possessors of the subject affected, tho' they should not represent the granter, 2. 8. 15.

3. Poinding of the ground, though it be properly a diligence or an execution, is generally considered by lawyers as a species of real actions; and is so called, to distinguish it from personal poinding, which is founded merely on an obligation to pay. Every *debitum fundi*, whether legal or conventional, is a foundation for this action. It is therefore competent to an annual-renter, for the interest due upon his right; to a superior, for his feu-duties or for his non-entry duties before citation in a declarator, according to the distinction laid down, 2. 5. 19.; and, in general, to all creditors in debts which make a real burden on lands. As it proceeds on a real right, it may be directed against all goods that can be found on the lands burdened, even tho' the original debtor should be divested of the property, in favour of a singular successor: But, 1. Goods brought upon the ground by strangers, are not subject to this diligence, 6. Feb. 1679, *Collet*. 2. Even the goods of a tenant cannot be poinded for more than his term's rent, by 1469, c. 37.; i. e. as practice has explained it, for more than the tenant was *de facto* owing to his master of past rents, at the time of poinding, 4. Feb. 1674, *Lady Pitfoddels*. Poinding of the ground, to whom competent.

4. In a poinding of the ground, not only the natural possessors must be cited, but the proprietor of the ground, who has an obvious interest in the issue of the cause. Where the action is brought against lands that are called in wadset, the wadsetter must be cited, Who are who

Effects of
a decree
of poind-
ing the
ground.

who is really the proprietor, and not the rever-
fer who has the bare right of redemption. The
defenders in this action are made parties, not as
debtors to the pursuer, but as proprietors or
possessors of the lands affected; because the
process being founded on a real right, affects
the lands themselves. A decree, therefore,
when it is once obtained upon it, operates a-
gainst all singular successors in the lands, with-
out any new sentence, 26. *June 1662, Adam-
son*: Whereas, in personal poinding, the goods
are not poinded, as being on the ground of
any special lands, but as the goods of the pur-
suer's debtor; and therefore the warrant can-
not extend against the goods of any other than
the debtor.

Actions
ordinary
and rescis-
sory.

5. Actions are either ordinary or rescissory.

All actions are, in the sense of this division, or-
dinary, which are not rescissory. Rescissory
actions are divided, 1. Into actions of proper
improbation. 2. Actions of reduction-improb-
ation. 3. Actions of simple reduction. Proper
improbations, which are brought for declaring
writings false or forged, are treated of below.

Reduc-
tion-im-
proba-
tion.

4. 4. 34. *et seqq.* Reduction-improbation is a
action, whereby a person who may be hurt or
affected by a writing, insists for producing or
exhibiting it in court, in order to have it let
side, or its effect ascertained, under the certifi-
cation that the writing, if not produced, shall
be declared false and forged. This certifica-
tion is a fiction of law, introduced that the
production of writings may be the more effec-
tually forced, and therefore it operates only
favour of the pursuer; so that the writing
though declared false, continues in full strength.

Certifica-
tion,

in all questions with third parties. Because the summons, in this action, proceeds on alleged grounds of falsehood, his Majesty's Advocate, who is the public prosecutor of crimes, must concur in it.

6. This action may be founded, either upon a real interest, or a personal. A proprietor of lands has a real interest to reduce all deeds affecting his estate: And though a pursuer's interest, in consequence of his property, appears to be equally strong, whether the deeds in question flow from his author or not; yet, by our practice hitherto, no writings can be called for in this process, but those which have been granted by persons with whom the pursuer connects a title, *St. 4. 20. 14.—F. 16. Dec. 1709, l. Innercauld.* By our older forms, one whole right to lands was merely personal, could not call for seifins of these lands, in order to reduction; but now he may, if they be granted by his author, *24. Jan. 1739, Keith.* Where the writings called for were not granted to the defender himself, but conveyed to him under singular titles, the pursuer was formerly obliged to cite the defender's authors who were liable to their disponent in warrandice; but, to prevent unnecessary delays, defenders are, by the present practice, obliged to cite their own authors, *Act S. 16. Feb. 1723.* A reduction-improbation is founded on a personal interest, when one insists for certification against deeds granted by himself, or by any of his ancestors whom he represents by service; but this is not competent to an apparent heir, because he can have no interest till he be served.

7. As

Terms assigned for production.

Can certification pass against writings in publica custodia?

Simple reduction.

7. As the certification in this process draws after it so heavy consequences, three successive terms were, by the former custom, assigned to the defenders for production, which are reduced to two, by 1672, c. 16. § 25. *concerning the Session*. After the second term is elapsed, intimation must be made judicially to the defender, to satisfy the production within ten days; and, till these are also expired, no certification can be pronounced, *Act S. 1. Jan. 1709*. Certification cannot pass against deeds recorded in the books of Session, if the defender shall, before the second term, offer a condescendence of the dates of their registration, they being considered as already in the hands of the clerk of court; and even thereafter, an extract of a deed so recorded, will stop certification against the original, unless falsehood be objected; in which case, the original must be brought from the record, to the court. Extracts of charters from the chancery cannot stop certification; for, as no charters are recorded there, after sealing, that record proves not the existence of a sealed charter. No extract from an inferior court is a bar to certification; the principal writing must be laid before the Court of Session on a proper warrant.

8. In an action of simple reduction, the certification is only temporary, declaring the writing called for null, until they be produced; so that they recover their full force after production, even against the pursuer himself; for which reason, that process is now seldom used. Because its certification is not so severe as in reduction-improbation, there is but one term assigned

signed to the defender for producing the deeds called for.

9. The most usual grounds of reduction of writings are, the want of the requisite solemnities, 3. 2. 3.; or that the granter was minor, 1. 7. 19.; or interdicted, 1. 7. 34.; or inhibited, 2. 11. 2.; or that he signed the deed on deathbed, 3. 8. 46.; or was compelled or frightened into it; or was circumvented; or that he granted it in prejudice of his lawful creditors. Grounds of reduction.

10. In reductions on the head of force, or fear, or fraud and circumvention, the pursuer must libel the particular circumstances from which his allegation is to be proved; and, though not any one of them should be relevant or sufficient by itself, they may, when joined together, be sufficient to reduce the deed. Where, therefore, there is the least appearance of relevancy, the court is in use, before answer, *i. e.* before pronouncing any interlocutor upon the relevancy of the circumstances libelled, to allow a conjunct proof to both parties, as to the manner of granting the deed. Reduction is not competent upon every degree of force or fear; it must be such as would shake a man of constancy and resolution. Neither is it competent, on that fear which arises from the just authority of husbands or parents over their wives or children, *l. 21. 22. de rit. nupt.*; nor of magistrates over those subjected to them, *l. 3. § 1. quod. met. causa*; nor upon the fear arising from the regular execution of lawful diligence by caption, provided the deeds granted under that fear relate to the ground of debt contained in the diligence, 22. *Jan. 1667, Mair*; but, if they Reduction upon force or fear, or circumvention;

they have no relation to that debt, they are reducible *ex metu*, *Pr. Falc.* 4.

nor on the
granter's
facility,
per se.

11. Where a person of a weak or facile temper executes a deed in itself irrational, the most slender circumstances of fraud on the part of the receiver, will be laid hold of, to set it aside. But, without some such circumstance, the deed must stand; for, let a person be ever so subject to imposition, if he is not fatuous or legally interdicted, his deeds are effectual, unless they have been drawn from him by unfair practices. Yet, where the deed itself discovers oppression, or a catching an undue advantage from the necessities, of our neighbour, dolo is said *in esse in re*, and so requires no extrinsic proof. Thus, a bond taken from an heir for quadruple the sum lent, tho' payable only in the event that he should succeed to his ancestor, was reduced, except as to the principal sum really advanced, and its interest, 13. *July 1745, Abercromby.*

Reduction
upon the
act 1621.

First part
of the act.

Who are
deemed
prior cre-
ditors;

Conjunct
or confi-
dent per-
sons.

12. The reduction of alienations hurtful to creditors, is founded upon the act 1621, c. 18. which we have borrowed from the Roman law, *l. 1. et seqq. quae in fraud. cred.* By the first part of this statute, all alienations granted after contracting of lawful debts, in favour of conjunct or confident persons, without true, just, and necessary causes, and without a just price really paid, are declared null. One is deemed a prior creditor, whose ground of debt existed before the right granted by the debtor; tho' the written voucher of the debt should bear a date posterior to it, 21. *Jan. 1669, cred. of Pollock.*—27. *July 1669, Street.* Persons are accounted conjunct, whose relation to the grantor is so near, as to bar them from judging in his

his cause, 8. Feb. 1712, Lord *Elibank*. Confident persons are those who appear to be in the granter's confidence, by being employed in his affairs, or about his person; as a doer, steward, or domestic servant.

13. Tho', by the letter of this act, the right to be reduced must be granted, both without a price paid, and in favour of a conjunct or confident person; yet, by practice, gratuitous rights, even where they are granted to strangers, are subject to reduction. But rights, tho' gratuitous, are not reducible, if the granter had, at the date thereof, a sufficient fund for the payment of his creditors, *Dirl.* 287.—*K.* 9. Provisions to children are, in the judgment of law, gratuitous; so that their effect, in a question with creditors, depends on the solvency of the granter: But settlements to wives, either in marriage-contracts, 18. Nov. 1729, cred. of *Theirs*, or even after marriage, are onerous, in so far as they are rational; and consequently are not reducible, even though the granter was insolvent, 11. Jan. 1738, *Robertson*.—17. Feb. 1728, Sir *R. Mackenzie*. This rule holds also in rational tochers contracted to husbands, *Forb.* MS. 22. Jan. 1714, *Lockhart*: But it must, in all cases, be qualified with this limitation, *if the solvency of the granter was not publicly known*; for, if it was, fraud is presumed in the receiver of the right, by contracting with the bankrupt, 23. Nov. 1680, *Wood*.

14. The creditor who objects to the deed, must, by the words of the act, prove that it was gratuitous, either by the oath or writing of the receiver; but, as the statute is now explained, the receiver, if he be a conjunct or confident

On whom
does the
proof lie.

confident person, must abstract or support the onerous cause of his right, not merely by his own oath, but by some circumstances or adminicles, 15. *Dec. 1671, Duff*: If there is no real ground of suspicion, the slightest adminicles will serve, *K. 105*. Where a right is granted to a stranger, the narrative of it expressing an onerous cause, is sufficient *per se*, to secure it against reduction, 22. *June 1680, Trotter*.

Second
branch of
the act.

15. By a second branch of this statute, all voluntary payments or rights made by a bankrupt to one creditor, to disappoint the more timeous diligence of another, are reducible at the instance of that creditor who has used the prior diligence. Grants made by the debtor, in consideration of sums instantly advanced by the grantee, are not securities given to creditors, and so fall not under the sanction of the statute; *e. g.* a sale of lands, 8. *Feb. 1681, Nielson*, or a bond of borrowed money, 28. *June 1665, Monteith*. A creditor, tho' his diligence be but begun by citation, may insist in a reduction of all posterior voluntary rights granted to his prejudice, *Harc. 639.—F. 9 January 1696, Brown*; but the creditor who neglects to complete his begun diligence within a reasonable time, is not entitled to reduce a right granted by the debtor, after the time that the diligence is considered as abandoned, 9. *July 1709, Drummond*.

What is
meant by
prior diligence.

Reduction
not
good against
singular successors.

16. A prohibited alienation, when conveyed by the receiver, to another who is not privy to the fraud, subsists by the statute, in the person of the *bona fide* purchaser. Where the conjunction or confidence between the granter and receiver cannot be perceived, either from the

tenor of the right, or from the conveyance of it to the purchaser, the purchaser is not presumed to have been partaker of the fraud.

9. *Jan. 1730, Allan.* This statute declares all alienations made contrary thereto to be null, either by way of action or exception: But, in Nullity, practice, it is only in the case of moveable when re- rights, that the nullity is receiveable by excep- ceivable tion, 16. *June 1671, Bower*; it must be de- by excep- clared by reduction, where the right is heri- tion. table, 22. *July 1664, L. Lour.*

17. By act 1696. c. 5. all alienations by a Reduc- bankrupt, within sixty days before his bankrupt- tion upon cy, to one creditor in preference to another, are the act reducible, at the instance even of such co credi- 1696. tors as had not used the least step of diligence. A bankrupt is there described by the following characters; diligence used against him by horn- ing and caption; and insolvency, joined either with imprisonment, retiring to the sanctuary, absconding, or forcibly defending himself from diligence. It is sufficient that a caption is raised against the debtor, tho' it be not executed, pro- vided he has retired to shun it, 24. *Feb. 1737, Lord Killkerran.* It is provided, that all heri- table bonds or rights on which seisin may fol- low, shall be reckoned, in a question with the grantor's other creditors upon this act, to be of the date of the seisin following thereon; and it has been variously decided, whether heritable bonds, granted in security of debts presently contracted, fall under this branch of the statute; but, by the last decision, *Falc. 2. 189.* the act was found to relate only to securities for for- mer debts, and not to *nova debita* *.

18. Rights

* This statute is found to extend to deeds granted by

Trust-
right, if
reducible.

18. Rights granted by a debtor in trust for his creditors, tho' they should contain no partial clause, preferring any one creditor before the rest, were formerly set aside at the suit of those creditors who did not accede to them; because the right of creditors to affect their debtor's estate by diligence, ought not to be restrained, by a deed of the debtor, imposing a trustee on them without their consent, 12. *July 1734, Snee*: But now they are sustained, if the debtor be not bankrupt in the precise terms of the statute 1696, 13. *Nov. 1744, Snodgrafs*,—*Falc.* 1. 179.

Actions,
either *rei*
persecuto-
riae, or
penal.

19. Actions are, both by the Roman law and ours, divided into *rei persecutoriae*, and *penales*. By the first, the pursuer insists barely to recover what *patrimonio ejus abest*, the subject that is his, or the debt that is due to him; and this includes the damage sustained by the pursuer, *damnum et interesse*; for one is as truly a sufferer in his patrimonial interest by that damage, as by the loss of the subject itself. In penal actions, which always arise *ex delicto*, something is also demanded by way of penalty.

Action of
spuilzie.

20. Actions of spuilzie, ejection, and intrusion, are penal. An action of spuilzie is competent to one dispossessed of a moveable subject violently, or without order of law, against the person dispossessing; not only for being restored to the possession of the subject, if extant, or for the value, if it be destroyed, but also for the violent profits, (as to which see 2. 6. 24.), in case the action be brought within three

a Scotch bankrupt, executed in England. See *Ne Coll.* 11. No. 116.

three years from the spoliation. The pursuer need prove no more than that he was in the lawful possession: Nay, tho' the defender should offer to prove himself proprietor, it is no good defence; for he ought not *jus sibi dicere*. But it is a relevant defence, that the defender had a probable title for what he did, for *quilibet titulus excusat a spolio*; or that he made voluntary restitution, *de recenti*, of the goods spuilzied, *cum omni causa*. Ejection and intrusion are, in heritable subjects, what spuilzie is in moveables. The difference between the two first is, that, in ejection, violence is used; whereas the intruder enters into the void possession, without either a title from the proprietor, or the warrant of a judge. The actions arising from all the three are of the same general nature.

Ejection
and in-
trusion.

21. The action of contravention of lawborrows is alio penal. It proceeds on letters of law-borrows, (from *borgh* a cautioner), which contain a warrant to charge the party complained upon, that he may give security, not to hurt the complainer in his person, family, or estate, 1429, c. 129.—1581, c. 117. These letters do not require the previous citation of the party complained upon, because the caution which the law requires is only for doing what is every man's duty; but, before the letters are executed against him, the complainer must make oath, that he dreads bodily harm from him. The penalty of contravention is its penal, ascertained to a special sum, according to the offender's quality, the half to be applied to the fisk, and the half to the complainer, 1593, c. 166.; which may be demanded though the person complained upon should not have given caution,

Contra-
vention of
lawbor-
rows;

caution, in obedience to the letters, 1597, c. 269. Contravention is not incurred by the uttering of reproachful words, where they are not accompanied, either with acts of violence, or at least a real injury; and as the action is penal, it is elided by any probable ground of excuse.

Penal actions not transmissible against heirs.

Exception to this rule.

22. Penalties are the consequences of delict, or transgression; and as no heir ought to be accountable for the delict of his ancestor, farther than the injured person has really suffered by it, penal actions die with the delinquent, and are not transmissible against heirs. Yet the action, if it has been commenced, and litiscontested in the delinquent's lifetime, may be continued against the heir, though the delinquent should die during the dependence; as to which, see § 40. Some actions are *rei persecutoriae* on the part of the pursuer, when he insists for simple restitution, which yet may be penal in respect of the defender; e. g. the action on the passive title of vicious intromission, by which the pursuer frequently recovers the whole debt due to him by the deceased, tho' it should exceed the value of the goods intermeddled with by the defenders.

Actions
petitory;

23. The most celebrated division of actions in our law, is into petitory, possessory, and declaratory. Petitory actions are those, where something is demanded from the defender, in consequence of a right of property, or of credit in the pursuer: Thus, actions for restitution of moveables, actions of poinding, of forthcoming, and indeed all personal actions upon contracts or quasi-contracts, are petitory. Possessory. Possessory actions are those which are founded, either

either upon possession alone, as spuilzies, or upon possession joined with another title, as removings, 2. 6. 23.; and they are competent, either for getting into possession, for holding it, or for recovering it; analogous to the interdicts of the Roman law, *quorum bonorum, uti possidetis*, and *unde vi*. The nature and privileges of possession have been already explained, 2. 1. 12. *et seqq.*

24. An action of molestation is a possessory Action of action competent to the proprietor of a land. molesta-
estate, against those who disturb his possession. tion.
It is chiefly used in questions of commonry, or of contraverted marches. Where it is pursued before the session, the judges are, by 1587, c. 42. ratifying an act of federunt, ordained to remit the cause to the sheriff of the county where the lands lie; who is impowered to take cognition of the marches, and to put the facts contained in the libel and defences to the knowledge of an inquest, consisting of persons dwelling in the parish, most of them landed men: But this is now seldom practised; for the court ordinarily allow a proof to be brought before themselves, and give judgment thereupon. Where a declarator of property is conjoined with a process of molestation, the session alone is competent to the action. Actions on brieves Brief of
of perambulation, 1579, c. 79. have the same perambu-
tendency with molestations, *viz.* the settling lation.
of marches between conterminous lands: The difference commonly stated between the two, is, that the first sort is founded solely on a right of property, and so is petitory; whereas, in molestations, the pursuer founds also on his possession.

25. The

Action of
mails and
duties.

25. The action of mails and duties is sometimes petitory, and sometimes possessory. In either case, it is directed against the tenants and natural possessors of land-estates, for payment to the pursuer of the rents remaining due by them for past crops; and of the full rent for the future. It is competent, not only to a proprietor whose right is perfected by seisin, but to a simple disponent; for a disposition of lands includes a right to the mails and duties; and consequently to an adjudger, for an adjudication is

Petitory. a judicial disposition. In the petitory action, the pursuer, since he founds upon right, not possession, must make the proprietor, from whom the tenants derive their right, party to the suit; and he must support his claim by titles of property or diligences, preferable to those in the

Possessory. person of his competitor. In the possessory, the pursuer who libels that he, his ancestors, or authors, have been seven years in possession, and that therefore he has the benefit of a possessory judgment, need produce no other title than a seisin, which is a title sufficient to make the possession of heritage lawful; and it is enough if he calls the natural possessors, tho' he should neglect the proprietor, *St. 4. 22. 14. et seqq.* A possessory judgment founded on seven years possession, in consequence either of a seisin or a tack, has this effect, that tho' one should claim under a title preferable to that of the possessor, he cannot compete with him in the possession; till, in a formal process of reduction, he shall obtain the possessor's title to be declared void, *St. 4. 26. 3.*

A possessory judgment.

Declaratory actions;

26. A declaratory action is that, in which some right is craved to be declared in favour of

of the pursuer, but nothing sought to be paid or performed by the defender, such as declarators of marriage, of irritancy, of expiry of the legal reversion, actions competent to superiors or their donataries for declaring casualties incurred by vassals, &c. Under this class may be also comprehended rescissory actions, which, without any personal conclusion against the defender, tend simply to set aside the rights or writings libelled, in consequence of which a contrary right or immunity arises to the pursuer. Declarators of property are now seldom used, because rights affecting property are more effectually forced into the field, by the action of reduction in probation, which has always a declaratory conclusion subjoined to it. Decrees ^{their pro-} upon actions that are properly declaratory con- ^{perties.} sider no new right; they only declare what was the pursuer's right before, and so have a retrospect to the period at which that right first commenced, as in declarators of life-rent-escutcheon, 5. 33.; but this character is not applicable to most of our declaratory decrees. Declarators, because they have no personal conclusion against the defender, may be pursued against an apparent heir without a previous charge given him to enter to his ancestor; unless where special circumstances require a charge.

27. An action for proving the tenor, where- ^{Action of} a writing, which is destroyed or amissing, is ^{proving} ^{the tenor.} ^{deavoured to be revived, is in effect declaratory.} In obligations that are extinguishable, solely by the debtor's retiring or cancelling them, the pursuer, before a proof of the tenor admitted, must condescend on such a *casus Casus a-* *missionis*, or accident by which the writing *missionis.*

was destroyed, as shows it was lost when in the creditor's possession; otherwise bonds that have been cancelled by the debtor on payment, might be reared up, as still subsisting against him: But in writings which require contrary deeds to extinguish their effect, as assignations, dispositions, charters, &c. it is sufficient to libel that they were lost and how, even *casu fortuito*, *St. 4. 32. 3. 4.*

Admini-
cles in
writing,

28. Regularly, no deed can be revived by this action, without some adminicle in writing, *i. e.* without some collateral deed, referring to that which is libelled; for no written obligation ought to be raised up barely on the testimony of witnesses: Yet, where one's whole writings have been destroyed by fire, or in other such special cases which call for an extraordinary remedy, a proof of the tenor may be admitted, without any such adminicle, *St. ibid.* These adminicles afford sufficient conviction, that the deed libelled did once exist, the tenor is admitted to be proved by witnesses, who must depose, either that they were present at signing the deed, or that they afterwards saw it duly subscribed. Where the relative writings contain all the substantial clauses of that which is lost, the tenor is sometimes sustained without witnesses, *F. 26. June 1712, Inglis.* In a writing which is libelled to have contained usual common clauses, all these must appear by adminicles; otherwise a right might be again brought to life, of a quite different nature from that which was lost.

some-
times suf-
ficient *per se.*

Can the
tenor of
all writ-
ings be
proved?

29. The tenor of all writings, both voluntary and judicial, may be proved by this action, even decrees of apprising, which, of all others, require

require the greatest nicety of form, *Dirl.* 283. By act 1579, c. 94. the tenor of letters of horning and execution thereof, which have not been judicially produced, cannot be proved by witnesses; but this statute does not seem to extend to the case of hornings supported by written adminicles. Actions of proving the tenor are, on account of their importance, appropriated to the Court of Session; and, by the old form, the testimony of the witnesses could not be received, but in presence of all the judges.

30. The action of double or multiple-poin-
ding may be also reckoned declaratory. It is
competent to a debtor, who is distressed or
threatened with distress, by two or more per-
sons claiming right to the debt, and who there-
fore brings the several claimants into the field,
in order to the debating and settling their se-
veral preferences, that so he may pay securely
to him whose right shall be found preferable.
This action is daily pursued by an arrestee, in
the case of several arrestments used in his hands
for the same debt, or by tenants, in the case
of several adjudgers, all of whom claim right
to the same rents. In these competitions, any
of the competitors may bring an action of
multiple-poin ding in name of the tenants, or
other debtors, without their consent, or even
tho' they should disclaim the process; since the
law has introduced it as the proper remedy for
getting such competitions determined: And
while the subject in controversy continues in
medio, any third person who conceives he has
right to it, may, tho' he should not be cited
as a defender, produce his titles, as if he were
an

Multiple-
poin ding,

may be
pursued
by any
having in-
terest, tho'
the debtor
disclaim.

an original party to the suit, and will be admitted for his interest in the competition.

Accessory
actions.

Exhibi-
tions.

Incident
diligence.

Transfe-
rence.

Transfe-
rence ac-
tive, now
unneces-
sary.

31. Certain actions may be called accessory, because they are merely preparatory or subser-
vient to other actions. Thus, exhibitions *ad
deliberandum*, 3. 8. 27. are intended only to
pave the way for future processes. Where a
party to a suit was to prove a point by writings
which were in the hands of a third person, a
separate action was, by our ancient forms, ne-
cessary for forcing the exhibition thereof, *St. 4.*
41. 4. 5.; but this is now done summarily, by
an incident diligence granted by warrant of
the court, against the havers or possessors of
these writings, for exhibiting them. The per-
sons cited on this diligence must either produce
the writings called for, or depose that they nei-
ther have them, nor had them since the citation,
nor have fraudulently put them out of their cu-
stody to elude a future citation, nor suspect by
whom they were taken away, nor where they
now are; see *Act S. 22. Feb. 1688.*

32. An action of transference is also of this
fort, whereby an action, during the pendency
of which the pursuer or defender happens to
die, is craved to be transferred from the de-
ceased to his representative, in the same condi-
tion in which it stood formerly. If it be the
pursuer who is dead, it was called a transference
active; if the defender, it is a transference *pas-*
sive. Upon the pursuer's death, his heir may
now, by 1693, c. 15. insist in the cause against
the defender, without a transference *active*
upon producing, either a retour or a confirmed
testament, according as the subject is heri-
table or moveable: But transferences *pas-*
sive continue

continue by that act on the former footing; it being reasonable, upon the death of a defender, to give previous notice to his heir, before he be obliged to defend in a process, of which perhaps he knew nothing before. Transferences being but incidental to other actions, ^{What judges can} can be pronounced by that inferior judge alone, ^{transfer.} before whom the principal cause depended; but, where the representatives of the deceased live in another territory, it is the supreme court which must transfer, *Gosford*, 9. Jan. 1674, *Denholm*. By the above cited statute 1693, obligations may now be registered summarily after the creditor's death; which before was not admitted, without a separate process of registration, to which the granter was necessarily to be made a party.

33. A process of wakening is likewise accessory. An action is said to sleep, when it lies ^{Waken-} over, not insisted in for a year, in which case its effect is suspended; but even then it may, at any time within the years of prescription, be revived or wakened by a summons, in which the pursuer recites the last step of the process, and concludes that it may be again carried on as if it had not been discontinued. An action, that stands upon any of the inner-house rolls cannot sleep; nor an action in which decree is pronounced, because it has got its full completion: Consequently, the decree may be extracted after the year, without the necessity of a wakening.

34. An action of transumpt falls under the same class. It is competent to those who have ^{sumpt,} a partial interest in writings that are not in their own custody, against the possessors thereof, for

competent to any having interest.

Summonses *praevento termino* ;

Actions proceeded anciently on briefes ;

now, on summonses.

for exhibiting them, that they may be transu-
med for their behoof. Tho' the ordinary title
in this process be an obligation by the defend-
er, to grant transumps to the pursuer, it is suf-
ficient if the pursuer can show that he has an
interest in the writings ; but, in this case, he
must transume them on his own charges. Ac-
tions of transumpt may be pursued before any
judge-ordinary. After the writings to be tran-
sumed are exhibited, full duplicates are made
out, collated, and signed, by one of the clerks
of court, which are called transumps, and are
as effectual as an extract from the register, so
that they cannot be defeated, but by impro-
bation ; in which case, the user of the tran-
sumpt must either produce the principal writings
themselves upon a diligence, or otherwise suffer
certification to pass against them. Advocations,
1. 2. 20. and suspensions, 4. 3. 5. are not so
properly accessory actions, as judicial steps that
give a new form to the action to which they
relate. Summonses *praevento termino*, which
were used for shortening the days of appear-
ance assigned in suspensions or advocations, are
now quite in disuse ; for, by the present practice,
a fixed rule is observed with respect to these
days ; and no suspension or advocacy passes
upon long days, as the custom was formerly.

35. Actions proceeded anciently upon briefes
issuing from the chancery, directed to the justi-
ciary or judge-ordinary, who tried the matter
by a jury, upon whose verdict judgment was
pronounced : And to this day, we retain certain
briefes, as of inquest, terce, idiotry, tutory,
perambulation, and perhaps two or three others.
But summonses were, immediately upon the
institution

institution of the College of Justice, introduced into our law, in the place of brieves. A summons, when applied to actions pursued before the session, is a writ in the King's name, issuing from his signet upon the pursuer's complaint, authorising messengers to cite the defender to appear before the court, and make his defences.

Formerly, when a summons passed the Signet, it contained little more than the pursuer's name, and the date of signeting: Before citing the defender upon it, his name and the days of appearance were filled up in the blank; but the libel or declaration, setting forth the ground of action, needed not to have been ingrossed in it, till it was called in court. By *Act S. 16. Feb. 1723*, which was but temporary, the libel was ordained to be filled up in summonses before execution, with certain exceptions therein contained; and this act is made perpetual by a posterior one, *19. Feb. 1742*.

Summon-
ses must
be now li-
belled.

36. The days indulged by law to a defender, between his citation and appearance, to prepare for his defence, are called, *induciae legales*. If he is within the kingdom, twenty-one and six days, for the first and second diets of appearance, must be allowed him for that purpose; and, if out of it, sixty and fifteen. Defenders residing in Orkney or Zetland must be cited

*Induciae
legales.*

on forty days, *1685, c. 43*. In certain summonses which are privileged, the *induciae* are shortened: Spuilzies and ejections proceed on fifteen days, *1503, c. 65*. wakenings and transferences, being but incidental, on six; see the list of privileged summonses, in *Act S. 29. June 1672*. A summons must be executed, *i. e.* served against the defender, so as the last diet of

Privileged
summons.

of

Actions
triable
without
summons.

of appearance may be within a year after the date of the summons; and it must be called within a year after that diet, otherwise it falls for ever. Offence against the authority of the court, acts of malversation in office, by any member of the College of Justice, and acts of violence and oppression, committed during the dependence of a suit, by any of the parties, may be tried without a summons, by a summary complaint.

Concourse
of actions. 37. Different civil actions were, by the Roman law, frequently competent, on the same ground-right, to the pursuer; who, after he had prevailed in one action, might insist in the other, in so far as it contained more than he had recovered by the first. Our law knows no such concurrence; for, where an action is in part penal, *e. g.* a removing, *spuilzie*, &c. a pursuer who restricts his demands to, and obtains decree merely for restitution, cannot thereafter bring a new process for the violent profits. Yet the same fact may be the foundation both of a criminal and civil action, because these two are intended for different purposes; the one for satisfying the public justice, the other for indemnifying the private party: And tho' the defender should be absolved in the criminal trial, for want of evidence by witnesses, the party injured may bring an action *ad civilem effectum*, in which he is entitled to refer the libel to the defender's oath.

Accumulation of
actions.

38. Where actions of different kinds were competent, tho' upon the same ground of right, they could not, by the Roman law, be included in the same libel, *l. 43. § 1. d. reg. jure*; for every different species of action had a particular
formula,

formula, which it behoved the pretor to observe, in remitting the cause to the judge. But, where one had separate claims against another, all productive of the same sort of action, he might have thrown them into one libel, *l. 52. § 14. pro socio*; because there, as the actions were of the same kind, one *formula* served for all. By our forms, one libel may contain different conclusions on the same ground of right, rescissory, declaratory, petitory, &c. if they be not repugnant to each other: Nay, tho' different sums be due to one, upon distinct grounds of debt, or even by different debtors, the creditor may insist against them all in the same summons.

39. Defences are pleas offered by a defender, for eliding an action. They are either dilatory, which do not enter into the cause itself, and so can only procure an absolutor from the *lis pendens*: Or peremptory, which entirely cut off the pursuer's right of action, (*que perimunt causam*). The first, because they relate to the forms of proceeding, must be offered *in limine judicii*, and all of them at once, *Act S. 20. Nov. 1711, § 16**. But peremptory defences may be proponed at any time before sentence, *l. 2. C. sent. resc.* But with the restriction contained in *Act S. 23. July 1674.*

Defences
dilatory
and per-
emptory.

40. A cause, after the parties had litigated it before the judge, was said by the Romans to be litiscontested. By litiscontestation a judicial contract is understood to be entered into by the litigants, by which the action is perpetuated against heirs, even when it arises *ex de-*

Litiscon-
testation.

3 L

licto.

* A reasonable time is allowed for verifying them, 24. *h. 1676.*

licto. By our law, litiscontestation is not formed till an act is extracted, admitting the libel or defences to proof, 7. Feb. 1712, *Stuart.*

TIT. 2. Of Probation.

Proba-
tion;

*prout de
jure;*

by single
combat;

ALL allegations by parties to a suit, must be supported by proper proof. Probation is either by writing, by the party's own oath, or by witnesses. In the case of allegations, which may be proved by either of the three ways, a proof is said to be admitted *prout de jure*; because, in such case, all the legal methods of probation are competent to the party: If the proof he brings by writing be lame, he may have recourse either to witnesses or to his adversary's oath; but, if he should first take himself to the proof by oath, he cannot thereafter use any other probation, for the reason assigned § 3.; and, on the contrary, a pursuer, who had brought a proof by witnesses, on an extracted act, was not allowed to recur to the oath of the defender, 18. Nov. 1737. *M^cBrair.* Single combat, as a sort of appeal to providence, was, by our ancient law, admitted as evidence, in matters both civil and criminal, *R. M. l. 3. c. 13. § 4.* It was restricted by *St. R. III. c. 16.* to the case of such capital crimes, where no other proof could be had, and some traces of this blind method of trial remained in the reign of *J. VI. 1600, c. 12;* for even by that act the King might authorize duels on weighty occasions.

2. As obligations or deeds, signed by the party himself, or his ancestors or authors, must be, of all evidence, the least libel to exception; therefore every debt or allegation may be proved by proper evidence in writing. The solemnities essential to probative deeds have been already explained, 3. 2. 3. *et seqq.*

Books of account kept by merchants, tradesmen, and other dealers in business, though not subscribed, are probative against him who keeps them; and, in case of furnishings by a shop-keeper, such books, if they are regularly kept by him, supported by the testimony of a single witness, afford a *sempilena probatio* in his favour, which becomes full evidence by his own oath in supplement, *Gosford, 5. June 1672, Wood.*

Books of accounts how far probative for the merchant.

Notarial instruments and executions by messengers bear full evidence, that the solemnities therein set forth were used, not to be invalidated otherwise than by a proof of falsehood; but they do not prove any other extrinsic facts therein averred, against third parties, nor are they evidence of the warrant on which they proceed: Thus, a seisin does not prove the existence of the relative charter, 20. Dec. 1664, *Norvel; non enim creditur referenti, nisi constet de relato.*

Notarial instruments, how far probative.

3. Regularly, no person's right can be proved by his own oath, nor taken away by that of his adversary; because these are the bare avowments of parties in their own favour. But, where the matter in issue is referred by one of the parties to the oath of the other, such oath, though made in favour of the deponent himself, is decisive of the point; not because a party's oath in his own cause is evidence, but because the

Probation by oath of a party on reference.

the reference is a virtual contract between the litigants, by which they are understood to put the issue of the cause upon what shall be deposed: And this contract is so strictly regarded, that the party who refers to the oath of the other cannot afterwards, in a civil action, plead upon any deed against the party deposing, inconsistent with his oath, *K. 31.* To obviate the snares that may be laid for perjury, he, to whose oath of verity a point is referred, may refuse to depose, till his adversary swear, that he can bring no other evidence in proof of his allegation, *St. 4. 44. 2.* The party to whom reference is made, in place of making oath, sometimes defers the point back to his adversary; but this is not indulged, unless it shall appear, from the circumstances of the case, that he himself cannot depose in the matter referred to him with distinctness.

In what cases a party may refuse to depose.

An oath of party affects only the litigants.

4. A defender, though he cannot be compelled to swear to facts in a libel properly criminal, yet may, in trespasses, where the conclusion is limited to a fine, or to damages; *e. g.* in blood-wits, *13. Feb. 1634, Bailie of Melrofs*; in batteries, *F. 24. July 1678, Gordon*; or injuries, *2. Jan. 1736, Stuart.* Wives are obliged to make oath, on debts contracted by them before marriage, *9. March 1627, Ker* and executors on debts due by the deceased, *13. March 1627, Ker*; which oaths are effectual against themselves, as to their proper interest: But the husband cannot be effected by the wife's oath; nor the relict, or others concerned in the executry, by that of the executor who is merely their trustee. In general, an oath of party cannot either hurt or benefit third parties.

parties; being, as to them, *res inter alios acta*, l. 9. § 7. l. 10. *de jurej.* A tutor's oath, though it cannot bind his minor in a matter of debt, yet is effectual against him as to acts of administration done by the tutor, 12. Dec. 1661, *Hepburn.*

5. An oath upon reference, is sometimes ^{Qualified} qualified by special limitations restricting it. ^{oaths.} The qualities which are admitted by the judge as part of the oath, are called intrinsic, those which the judge rejects or separates from the oath, extrinsic. Where the quality makes a ^{Qualities} part of the allegation which is relevantly re- ^{either in-}ferred to oath, it is intrinsic. Thus, because a ^{trinsic,} merchant, suing for furnishings after the three years, must, in order to make relevancy, offer to prove, by the defender's oath, not only the delivery of the goods, but that the price is still due; therefore, though the defender should acknowledge upon oath his having received the goods, yet, if he adds, that he paid the price, this last part, being a denial that the debt subsists, is intrinsic; since it is truly the point referred to oath. Where the quality does not ^{or extrin-}import an extinction of the debt, but barely a ^{fic.} counter-claim, or *mutua petitio*, against the pursuer, is held as extrinsic, and must be proved *aliunde*. The quality of compensation is extrinsic, 9. Dec. 1664, *Learmont*; for compensation does not operate by our law *ipso jure*. A creditor, in a holograph bond, is not obliged, even after the vicennial prescription is elapsed, to prove that the debt still subsists, but simply, that the bond was signed by the debtor, 1669, c. 9.; the quality of payment is therefore,
in

in this case, extrinsic, and resolves into a defence, being no part of the libel referred to oath.

In what
cases is
the qua-
lity of
payment
intrinsic.

6. One who sues on a debt, constituted neither by writing, nor before witnesses, must refer, not only its constitution, but subsistence, to the defender's oath; since the oath of the debtor, by which alone the debt can be proved, ought to be also effectual for a proof of its payment: The quality therefore of payment or satisfaction must, in such case, be intrinsic, by the above mentioned rule, 14. *Jan. 1737, Moffat*. Yet a defender who, in his oath, admits the constitution of a debt, cannot get off by adjecting the quality of payment, where the payment ought, by its nature, to be vouched by written evidence, 23. *Dec. 1707, Brown*. The observations made upon this point apply with equal force to the case where the defence of payment is referred by the defender to the pursuer: Thus, if the creditor shall depose, that the money he received was not in payment of the debt pursued for, but in consequence of a separate bargain, the quality is intrinsic, being really a denial of the point referred to oath, 27. *Nov. 1705, Sinclair*; but, if he acknowledges that he received a sum in payment, it will not avail him, tho' he should add, that he had afterwards disbursed it on the debtor's account.

Oaths in
supple-
ment,

7. Oaths of verity are sometimes deferred by the judge to either party, *ex officio*; which, because they are not founded on any implied contracts between the litigants, are not finally decisive, but may be traversed on proper evidence afterwards produced; or the cause, if it has been pursued before an inferior court, may be

be advocated, in respect the judge had no good reason to examine the party. These oaths are commonly put by the judge, for supplying a same or imperfect proof, and are therefore called, oaths in supplement. There are frequent instances of them, in that sort of disbursements by factors, which does not easily admit of vouchers; or in furnishings by merchants, the quantity or prices of which are not fully proved by witnesses. Where the evidence brought before the judge does not amount, even to a *semiplena probatio*, he ought not to take the party's oath in supplement, *F. 28. Dec. 1695, Thomson*. After a party deposes, upon a reference, either of his adversary or of the judge, in general terms, he cannot be re-examined upon any particular fact which may involve him in perjury, *Dirl. 453*. And, lest parties should be led into the suspicion of that crime, the court, where special interrogatories are to be put, begin with these, and then proceed to the general one; see *Diction. vol. 2. p. 15*.

8. To prevent groundless allegations, oaths of calumny have been introduced, by which either party may demand his adversary's oath, that he believes the facts contained in his libel or defences to be just and true, 1429, c. 125. As this is an oath, not of verity, but only of opinion, the party who put it to his adversary, does not renounce other probation, *St. 4. 44. 20.*; and therefore no party is bound to give an oath of calumny, on recent facts of his own, *Act S. 13. Jan. 1692*; for such oath is really an oath of verity. Formerly, parties, even after they had proved their allegations, might have been compelled to swear *de calumnia*, 13. *Jan. 1625*.

are deferred for supplying an imperfect proof.

Re-examination of a party not always allowed.

is only an oath of opinion;

cannot be put, after a full proof;

nor in reductions-
improbations ;

now much
in disuse.

A party
not com-
paring
to depose
is held *pro*
confesso ;

but he
may be
reponed,
either *ex*
justitia or
ex gratia.

1625, Lord *Duffus* ; but these oaths are now confined to the cases where the proof is not yet brought, or where it is defective, *F. 22. Dec. 1699, Logy*. They do not take place in reductions-improbations before production ; for the pursuer's allegation that the writings called for are false, is founded merely in a *fielto juris*, and so is not inconsistent with his believe that they are genuine, *Darl. 159*. They have not been so frequent since *Act S. 1. Feb. 1715, § 6*. where by any party, against whom a fact shall be alleged, is obliged, without making oath, to confess or deny it, and, in case of calumnious denial, is subjected to the expence that the other party has thereby incurred.

9. In all oaths, whether of verity or calumny, the citation carries, or at least implies, a certification, that, if the party does not appear at the day assigned for deposing, he shall be held *pro confesso* ; from a presumption of his consciousness, that the fact upon which he declines to swear makes against him ; but no party can be held *pro confesso*, if he be in the kingdom, without a previous personal citation used against him. The Court of Session are in use to restore the party, who offers *de recenti* to purge his contumacy, upon refunding to his adversary the expence he has been put to by the delay ; but no person will be restored *ex intervallo*, where the adverse party is in danger of losing his other probation, by the death of the witnesses, unless on the most pregnant grounds. Where one is restored *ex justitia*, e. g. because he was not legally cited, the effect of the certification is entirely taken off, *Harc. 741* ; but if he be restored *ex gratia*, and happens to die

die before deposing, the presumptive confession operates against his heir. Tho' an oath which resolves into a *non memini*, cannot be said to prove any point, yet where one so deposes upon a recent fact, to which he himself is privy, his oath is considered as a dissembling of the truth, and he is held *pro confesso*, as if he had refused to swear, 6. Feb. 1675, *Irvine*.

10. An oath *in litem*, is that which the judge defers to a pursuer, for ascertaining either the quantity or the value of goods which have been taken from him by the defender without order of law, or the extent of his damages. An oath *in litem*, as it is the affirmation of a party in his own behalf, is only allowed where there is proof that the other party has been engaged in some illegal act, *e. g.* in a *spuilzie*, or in an unwarrantable intermeddling with the pursuer's goods; or where the public policy has made it necessary, as in the case of *nautae, caupones, stabularii*, 3. 1. 11. This oath, as to the quantities, is not admitted, where there is a concurring testimony of witnesses brought in proof of it, see *F. 16. Jan. 1697, Fen.* When it is put as to the value of goods, it is only an oath of credulity; and therefore it has always been subject to the modification of the Lords, *Harc. 740.*: But, as a further check upon exorbitant values that may be put by the party on his own goods, the court has, by the later practice, ordained the pursuer, before making oath, to exhibit a special condescendence of the prices, with the grounds on which it proceeds, which they tax as they see reasonable, and then admit the oath,

not exceeding such previous modification, 19. Nov 1737, *Man.*

Probation by witnesses.

11. Anciently, when writing was little used, most points might have been proved by witnesses, *R. M. l. 3. c. 1. § 6. 22. 23. &c.*: Even that possession, which is essential to heritable rights, depended on the testimony of the *paracuriae*, 2. 3. 15.; but, after writing came to be a more general accomplishment, the lubricity of testimonies made it necessary to bring probation by witnesses within a narrower compass. By a constitution of Ch. IX. of France dated 1566, all contracts for sums exceeding

rejected in payments above L. 100 Scots;

in gratuitous promises;

in contracts where writing is adhibited.

In what cases, admitted below L. 100 Scots;

100 livres must be reduced into writing. The law of Scotland, tho' it has not carried this point so far, rejects the testimony of witnesses

1. In payments of any sum above L. 100. Scots, all which must be proved either *scripto vel juramento*, by *Act S. 8. June 1597.* 2. In all

gratuitous promises, which, tho' for the smallest trifle, cannot be proved by witnesses; since, as their force depends entirely on the import of the words uttered by the promiser, he may be misunderstood by inattentive hearers, 19. Jan 1672, *Deuchar.* 3. In all contracts, where

writing is either essential to their constitution 3. 2. 2. or where it is usually adhibited, as in the borrowing of money. And it is a general rule, subject to the restrictions mentioned in the next §, that no debt or right, once constituted by writing, can be taken away by witnesses, 1. *C. de testib.*

12. On the other part, probation by witnesses is admitted to the extent of L. 100 Scots in payments, nuncupative legacies, and verbal agreements which contain mutual obligation

26. *June 1706, Anderson.* And it is received to the highest extent, 1. In all bargains which have known engagements naturally arising from them, concerning moveable goods. 2. In facts performed in satisfaction, even of a written obligation, where such obligation binds the party precisely to the performance of them, 25. *Nov. 1624, Bisset*,—7. *Jan. 1662, E. Lauderdale.* 3. In facts, which with difficulty admit of a proof by writing, even tho' the effect of such proof should be the extinction of a written obligation, especially if the facts import fraud or violence; thus, a bond is reducible *ex dolo*, on a proof by witnesses. Lastly, all intromission by a creditor with the rents of his debtor's estate payable in grain, may be proved by witnesses, 4. *Feb. 1671, Wisbart*,—2. *Dec. 1675, Thomson*; and even intromission with the silver rent, where the creditor has entered into the total possession of the debtor's lands, 25. *Jan. 1711, Baillie.*

13. No person, whose near relation to another bars him from being a judge in his cause, 1681, c. 13, can be admitted as a witness for him; but he may against him, 24. *Nov. 1709, Monteith*; except a wife or child, who cannot be compelled to give testimony against the husband or parent, *ob reverentiam personae, et metum perjurii*, F. 23. *July 1700, Erskine, eod. die, Drummond.* Tho' the witness, whose proximity to one of the parties is objected to, be as nearly related to the other, the objection stands good, *New Coll.* 48. The testimony of domestic servants is rejected, because of their dependence on their masters; but that of handicraftsmen is admitted for those who employ them,

moveable tenants; them, *F. 26. Feb. 1685, Erskine*. Formerly moveable tenants, *i. e.* tenants who have no written tacks, were disallowed, from the presumed influence of their landlords over them; but now, since that influence is much worn out, our present practice admits them, *15. Jan. 1735, Balckader*.

infamous persons; 14. The testimony of infamous persons is rejected, *i. e.* persons who have been guilty of crimes that law declares to infer infamy, or who have been declared infamous by the sentence of a judge; but, *infamia facti* does not disqualify a witness, *31. Jan. 1671, Lady Milton*. Pupils are inhabile witnesses; being, in the judgment of law, incapable of the impressions of an oath. The testimony of women is always received, when it is *necessary, i. e.* when the fact cannot be proved without them; and it is seldom admitted, where other witnesses can be had, *Feb. 1730, Dunbar, — 13. Jan. 1736, Wiseman*. Near kinsmen or domestic servants may, where there is a penury of witnesses, arising from the nature or circumstances of the fact, be received *cum nota*; that is, their testimony, though not quite free from suspicion, is to be conjoined with the other evidence, and to have such weight given it as the judge shall think it deserves.

Witnesses are purged of partial counsel. 15. All witnesses, before they are examined in the cause, are purged of partial counsel, that is, they must declare, that they have no interest in the suit, nor have given advice how to conduct it; that they have got neither bribe nor promise, nor have been instructed how to depose; and that they bear no enmity to either of the parties. These, because they are the

*Initialia
testimoni.*

points

points put to a witness before his making oath, are called *initialia testimonii*. Where a party can bring present proof of a witness's partial counsel, in any of the above particulars, he ought to offer it before the witness be sworn; but, because such objection, if it cannot be instantly verified, will be no bar to the examination, law allows the party in that case to protest for *reprobator*, before the witness is examined; *i. e.* that he may be afterwards allowed to bring evidence of his enmity, or other inhability. Protestation for reprobator.

16. The Lords, by the former practice, admitted action of reprobator, tho' no such protestation had been entered, so long as sentence was not pronounced in the principal cause, provided it could be admitted without damage to him who had cited the witness, *F. 13, July 1700, Goodin*: But, by our present custom, reprobators are not received, unless specially protested for at the examination of the witness, even tho' he who summoned him can qualify no loss by the intermediate death of others, whom he might have brought for proof of the same facts, *5 Jan. 1737, Wright*. Reprobator is competent, even after sentence, where protestation is duly entered, *26. June 1623, Cochran*; but, in that case, the party insisting must consign *L. 100 Scots*, which he forfeits if he succumb, *3. Dec. 1635, Robinson*. This action must have the concurrence of the King's Advocate, because the conclusion of it imports perjury; and, for this reason, the witness must be made a party to it. *9. Nov. 1676, Pater*. The witness must be made a party.

17. The

Diligence
against
witnesses.

17. The interlocutory sentence or warrant, by which parties are authorised to bring their proof, is either by way of act, or of incident diligence. In an act, the Lord Ordinary who pronounces it, is no longer judge in the process; but, in an incident diligence, which is commonly granted upon special points that do not exhaust the cause, the Lord Ordinary continues judge. If a witness does not appear at the day fixed by the warrant of citation, a second warrant is granted of the nature of a caption, containing a command to messengers to apprehend and bring him before the court. Where the party to whom a proof is granted, brings none within the term allowed by the warrant, an interlocutor is pronounced, circumducing the term, and precluding him from bringing evidence thereafter. The word *circumduce* is used nearly in the same sense, *l. 73. 1. 2. de judic.* Where evidence is brought, if it be upon an act, the Lord Ordinary on the acts, after the term for proving is elapsed, declares the proof concluded, and thereupon a state of the case is prepared by the Ordinary on concluded causes, which must be judged by the whole Lords; but, if the proof be taken upon an incident diligence, the import of it may be determined by the Lord Ordinary in the cause.

Circum-
duction
for not
proving.

Conclu-
ded cause.

Presump-
tions,

18. Where facts do not admit a direct proof, presumptions are received as evidence, which, in many cases, make as convincing a proof as the direct. Presumptions are consequences deduced from facts known or proved, which infer the certainty, or at least a strong probability, of another fact to be proved. This kind of probation is therefore called artificial, because it requires

requires a reasoning to infer the truth of the point in question, from the facts that already appear in proof. Presumptions are either, 1. *juris et de jure*; 2. *juris*; or, 3. *hominis* or *judicis*. The first sort obtains, where statute or custom establishes the truth of any point upon a presumption; and it is so strong, that it rejects all proof that may be brought to elide it in special cases. Thus, the testimony of a witness, who forwardly offers himself without being cited, is, from a presumption of his partiality, rejected, let his character be ever so fair; and thus also, a minor, because he is by law presumed incapable of conducting his own affairs, is, upon that presumption, disabled from acting without the consent of his curators, though he should be known to behave with the greatest prudence. Many such presumptions are fixed by statute, 1592, c. 145.—1621, c. 18.—1690, c. 21. &c.

19. *Praesumptiones juris* are those, which our law-books or decisions have established, without founding any particular consequence upon them, or statuting *super praesumpto*. Most of this kind are not proper presumptions, inferred from positive facts, but are founded, merely on the want of a contrary proof; thus, the legal presumptions for freedom, for life, for innocence, &c. are in effect so many negative propositions, that servitude, death, and guilt, are not to be presumed, without evidence brought by him who makes the allegation. All of them, whether they be of this sort, or proper presumptions, as they are only conjectures formed from what commonly happens, may be elided, not only by direct evidence, but by other

*iudicis.**Fictio
juris.*

ther conjectures, affording a stronger degree of probability to the contrary. *Praesumptiones hominis* or *iudicis*, are those which arise daily from the circumstances of particular cases; the strength of which is to be weighed by the judge.

20. A *fictio juris* differs from a presumption. Things are presumed, which are likely to be true; but a fiction of law assumes for truth what is either certainly false, or, at least, is as probably false as true. Thus, an heir is feigned or considered in law, as the same person with his ancestor; thus also writings, against which certification is obtained in a reduction-improbation, are judged to be false, *fictione juris*, tho' the most convincing proof should be brought that they had once existed, and were genuine. Fictions of law must, in their effects, be always limited to the special purposes of equity for which they were introduced; see an example, 4. 1. 5.

TIT. 3. Of Sentences and their Execution.

*Res judi-
catae.*

PROPERTY would be most uncertain, if debateable points might, after receiving a definitive judgment, be brought again in question, at the pleasure of either of the parties: Every state has therefore affixed the character of final to certain sentences or decrees, which in the Roman law are called *res judicatae*, and which exclude all review or rehearing.

2. Decrees

2. Decrees of the Court of Session, are either Decrees *in foro contradictorio*, where both parties have of the session litigated the cause, or in absence of the defend- *in foro*; er. Decrees of the session *in foro* cannot, in the general case, be again brought under the review of the court, either on points which the parties neglected to plead before sentence (which we call competent and omitted), or upon points pleaded and found insufficient, (proponed and repelled) 1672 c. 16. § 19. But decrees, in what though *in foro*, are reversible by the court, cases reducible. where either they labour under essential nullities, *e. g.* where they are *ultra petita*, or not conformable to their grounds and warrants, or founded on an error in calcul, &c. or where the party against whom the decree is obtained has thereafter recovered evidence sufficient to overturn it, of which he knew not before, *St.*

4. 1. 44.—*Mackenzie*, § 1. *b. t.*

3. As parties might formerly reclaim against the sentences of the session, at any time before extracting the decree, no judgment was final till extract; but now a sentence of the inner-house, either not reclaimed against, within six Two consecutive interlocutors are final. *Act S. 9. July* 1709, or adhered to upon a reclaiming bill, though it cannot receive execution till extract, makes the judgment final as to the Court of Session, *Act S. 26. Nov. 1718.* And, by an order of the house of Lords, 24. *March 1725*, Time limited for appeals. no appeal is to be received by them from sentences of the session after five years from extracting the sentence; unless the person entitled to such appeal be minor, clothed with a husband, *non compos mentis*, imprisoned, or out of the kingdom. Sentences, pronounced by

the Lord Ordinary, have the same effect, if not reclaimed against, as if they were pronounced in presence; and all petitions against the interlocutor of an Ordinary must be preferred within eight *federunt* days after signing such interlocutor, *Act S. 9. July 1709.*

Decrees of the session in absence, are not *res judicatae*.

4. Decrees, in absence of the defender, have not the force of *res judicatae* as to him; for, where the defender does not appear, he cannot be said to have subjected himself, by the judicial contract which is implied in *litiscontestation*: A party therefore may be restored against these, upon paying to the other his costs in recovering them. The sentences of inferior courts may be reviewed by the Court of Session, before decree, by advocacy, 1. 2. 20. and after decree, by suspension or reduction; which two last are also the methods of calling in question such decrees of the session itself, as can again be brought under the review of the court.

Sentences are reviewed either by reduction, or suspension.

5. Reduction, 4. 1. 5.—18. is the proper remedy, either where the decree has already received full execution by payment, or where it decrees nothing to be paid or performed, but simply declares a right in favour of the pursuer. Suspension is that form of law by which the effect of a sentence-condemnatory, that has not yet received execution, is stayed or postponed till the cause be again considered. The first step towards suspension is a bill preferred to the Lord Ordinary on the bills. This bill, when the desire of it is granted, is a warrant for issuing letters of suspension, which pass the signature, but, if the presenter of the bill shall not, within fourteen days after passing it, expedite the letters, execution may proceed on the sentence.

Act S. 3. July 1677. Suspensions of decrees *in foro* cannot pass, but by the whole Lords in time of session, and by three in vacation time; but other decrees may be suspended by any one of the judges.

6. As suspension has the effect of staying the execution of the creditor's legal diligence, it cannot, in the general case, pass without caution given by the suspender to pay the debt, in the event it shall be found due, see *Act S. 29.*

Jan. 1650. Where the suspender cannot, from his low or suspected circumstances, procure unquestionable security, the Lords admit juratory caution, *i. e.* such as the suspender swears is the best he can offer; but the reasons of suspension are, in that case, to be considered with particular accuracy at passing the bill, *Act S. 8.*

Nov. 1682. The nature of the obligations, arising from this judicial cautionry, is explained,

3. 3. 28. Decrees in favour of the clergy, of universities, hospitals, or parish school-masters, for their stipends, rents, or salaries, cannot be suspended, but upon production of discharges, or on consignation of the sums charged for, 1669, *c. 6.*—1696, *c. 14.* A charger, who thinks himself secure without a cautioner, and wants dispatch, may, where a suspension of his diligence is sought, apply to the court to get the reasons of suspension summarily discussed on the bill.

7. Though he, in whose favour the decree is pronounced, be always called the charger, yet a decree may be suspended before a charge be given on it. Nay, suspension is competent even where there is no decree, for putting a stop to any illegal act whatsoever:

Thus,

The suspender cannot cite the charger upon his letters.

Decree of suspension.

Decree finding the letters orderly proceeded.

The execution of decrees ;

personal by letters of four forms ;

Thus, a building, or the exercise of a power which one assumes unwarrantably, is a proper subject of suspension. Letters of suspension bear the form of a summons, which contains a warrant to cite the charger ; and it is likely that they were anciently used by way of summonses : But they have now of a long time been considered merely as a prohibitory diligence ; so that the suspender, if he would turn provoker, must bring his action of reduction in common form, as was found in a suspension of the election of a magistracy, *Feb. 1722, Magistr. of Edinburgh*. It, upon discussing the letters of suspension, the reasons shall be sustained, a decree is pronounced, suspending the letters of diligence on which the charge was given *simpliciter* ; which is commonly called a decree of suspension, and has the same force with a reduction, as it takes off the effect of the decree suspended to perpetuity. If the reasons of suspension be repelled, the court find the letters of diligence orderly proceeded, *i. e.* regularly carried on ; and they ordain them to be put to farther execution.

8. Decrees are carried into execution, by diligence, either against the person, or against the estate of the debtor. The first step of personal execution was anciently by letters passing the signet, which were called letters of four forms, because the debtor was thereby charged to make payment, four times successively, each charge upon three days. By the fourth, he was charged either to pay the debt, or to enter himself into a prison specified in the letters ; and, if he did neither within the days of the charge, the messenger was directed to denounce

denounce him rebel; which severity was thought justifiable, because the debtor might have prevented it by entering into prison. Letters of and by horning were not authorised to pass upon liquid letters of horning. debts till 1584, *c.* 139.; but letters of four forms appear to have also continued in use till the year 1613; see *Sp. Pr.* p. 149. 150. Before horning could pass on the decree of an inferior judge, the decree was, by our former practice, to have been judicially produced before the session, and their authority interposed to it by a new decree; which, because it was made out in the precise terms of the other, was called a decree-conform: But now, letters Decree-conform. of horning may be granted by warrant of the court without the necessity of a decree-conform, on the decrees of magistrates of boroughs, sheriffs, admirals, and commissaries, 1593, *c.* 177.—1606, *c.* 10.—1609, *c.* 15.—1612, *c.* 7. Letters of horning were sometimes directed against all and sundry, without any previous decree, or even citation, *St.* 4. 3. 25. as letters against parishioners for building church-yard-dikes, in consequence of 1597, *c.* 232. or against the heritor of a parish for the payment of stipend. These general letters were declared, by General 1592, *c.* 140. to be no foundation for denoun- letters of letters of horning discharging any person who was not previously cited horning discharged. him; and now, by 1690, *c.* 13. no general letters can issue, except for the King's revenue, or ministers stipends, or upon poindings of the ground.

9. If the debtor does not obey the will of the letters of horning, within the days of the charge, 2. 5. 24. the charger, after denouncing

cing him rebel, and registering the horning,
 Letters of 2. 5. 25. 26. may apply for letters of caption,
 caption. which contain a command, not only to messengers, but to magistrates, to apprehend and imprison the debtor. All messengers and magistrates, who refuse their assistance in executing the caption, are liable *subsidiariae* for the debt; and such subsidiary action is supported by the execution of the messenger employed by the creditor, expressing that they were charged to concur, and would not. By magistrates are understood, only such as the law obliges to have sufficient prisons, as sheriffs, stewards, bailies of subsisting boroughs of regality, or magistrates of royal boroughs: Hence a bailie of a borough of barony cannot be charged to execute a caption, 13. *March* 1623, Bailie of *Duns*. Letters of caption contain an express warrant to the messenger, in case he cannot get access, to break open all doors, and other lock-fast places, where he is to search.

What
 persons
 secured
 against
 caption.

Privilege
 of sanctu-
 ary.

Protection
 against
 caption.

10. Law secures Peers and married women against personal execution by caption, upon civil debts. Pupils are secured by special statute, 1696, *c.* 41. No caption can be executed against a debtor, within the precincts of the King's palace of Holyroodhouse: But this privilege of sanctuary afforded no security to criminals, as that did which was, by the canon law, conferred on churches and religious houses. The King's castles are not entitled to this privilege, *Falc.* 2. 218. Where the personal presence of a debtor, under caption, is necessary in any of our supreme courts, the judges are impowered to grant him a protection for such time as may be sufficient for his coming

coming and going, not exceeding a month,
1681, c. 9.—1698, c. 22.

11. After a debtor is imprisoned, he ought ^{Prisoners} not to be indulged the benefit of the air, not ^{must be} even under a gaurd; for creditors have an in- ^{closely} terest, that their debtors be kept under close ^{confined.} confinement, that, by the *squalor carceris*, they may be brought to pay their debt: And any magistr-^{Magi-}te or jailor, who shall suffer the pri-^{strates,}soner to go abroad, without a proper attesta-^{when lia-}tion, upon oath, of the dangerous state of his ^{ble subsidi-} health is liable *subsidiarié* for the debt, by *Act* ^{arie for} *S. 14. June 1671.* Magistrates are in like ^{the debt.} manner liable, if they shall suffer a prisoner to escape, through the insufficiency of their prison, *Act S. 11. Feb. 1671:* But, if he shall escape under night, by the use of instruments, or by open force, or by any other accident which cannot be imputed to the magistrates or jailor, they are not chargeable with the debt; provided they shall have, immediately after his escape, made all possible search for him. Re-^{Form of}gularly, no prisoner for debt upon letters of ^{liberating} caption, tho' he should have made payment, ^{a prisoner.} could be released without letters of suspension, containing a charge to the jailor to set him at liberty; because the creditor's discharge could not take off the penalty incurred by the debtor for contempt of the King's authority: But, to save unnecessary expence to debtors in small debts, jailors are, by *Act S. 5. Feb. 1675,* impowered to let go prisoners where the debt does not exceed 200 merks *Scots*, upon production of a discharge, in which the creditor consents to his releafe. See *Act S. 18. July 1750.*

Liberation, upon
cessio bonorum,

must proceed on
the prisoner's
oath;

it is not
competent
to delinquents.

Dyvours
habit.

12. Our law, from a consideration of compassion, allows insolvent debtors to apply for a release from prison, upon a *cessio bonorum* i. e. upon their making over to the creditors all their estate, real and personal. This must be insisted for, by way of action, to which all the creditors of the prisoner ought to be made parties. The prisoner must, in this action, which is cognizable only by the court of session, exhibit a particular inventory of his estate, and make oath that he has no other estate than is therein contained, and that he has made no conveyance of any part of it, since his imprisonment, to the hurt of his creditors. He must also make oath, whether he has granted any disposition of his effects before his imprisonment, and condescend on the persons to whom, and on the cause of granting it; that the court may judge, whether, by any collusive practice, he has forfeited his claim to liberty, *Act S. 1. Dec. 1685, and 8. Feb. 1688.*

13. A fraudulent bankrupt is not allowed this privilege; nor a criminal who is liable in an assythment or indemnification to the party injured or his executors, tho' the crime itself should be extinguished by a pardon, *Falc. 2. 230.* A disposition granted on a *cessio bonorum* is merely in farther security to the creditors, not in satisfaction or *in solutum* of the debts. If, therefore, the debtor shall acquire any estate after his release, such estate may be attached by his creditors, as if there had been no *cessio*, except in so far as is necessary for his subsistence, *l. 4. pr. de cess. bon.*—*2. Att. c. 7.*
§ 3. Debtors, who are set free on a *cessio bonorum*, are obliged to wear a habit proper to dyvours

dyvours or bankrupts. The Lords are, by 1696, c. 5. prohibited to dispense with this mark of ignominy, unless, in the summons and process of *cessio*, it be libelled, sustained, and proved, that the bankruptcy proceeds from misfortune. And bankrupts are condemned to submit to the habit, even where no suspicion of fraud lies against them, if they have been dealers in an illicit trade, *New Coll.* 4.

14. Where a prisoner for debt declares upon oath, before the magistrate of the jurisdiction, that he has not wherewith to maintain himself, the magistrate may, by 1696, c. 32. set him at liberty, if the creditor, in consequence of whose diligence he was imprisoned, does not alimnt him within ten days after intimation made for that purpose. But the magistrate may, in such case, detain him in prison, if he refuses to bear the burden of the aliment, rather than release him, 20. Feb. 1713, *Grierison*. This statute, which is usually called the act of grace, is limited to the case of prisoners for civil debts: No prisoner, therefore, can claim the benefit of it who is committed, either for not performing a fact in his own power, *F.* Dec. 1709, *Ross*, or for not paying a fine or damages arising *ex delicto*, 23. Nov. 1738, *Maclefly*.

Indigent prisoners must either be alimnted, or liberated on the act of grace.

15. Decrees are executed against the moveable estate of the debtor by arrestment or poinding, *B.* 3. *T.* 6.; and against his heritable estate, by inhibition, *B.* 2. *T.* 11. or adjudication, *B.* 2. *T.* 12. Letters of poinding, as well as of horning, may be issued by warrant of the court of session, on the decrees of inferior judges, 1661, c. 29. A messenger employed

Execution against the debtor's estate.

Letters
of open
doors.

Letters of
ejection.

Decrees
arbitral.

Submis-
sion.

Overf-
man.

ployed in poinding, if he has not also letters of caption alongſt with him, has no power to break open doors; but, if he returns an execution that accels was denied him, letters will be iſſued of courſe, giving him that power, which are called, letters of open doors. If one be condemned, in a removing or other proceſs, to quit the poſſeſſion of lands, and refuſes, notwithstanding a charge, letters of ejection are granted of courſe, ordaining the ſheriff to eject him, and to enter the obtainer of the decree into poſſeſſion. Where the party ſtill continued to poſſeſs in ſpite of law, the Scots Privy council, while that court ſubſiſted, granted letters of fire and ſword, authoriſing the ſheriff to diſpoſſeſs him by all the methods of force; but, by our preſent practice, where one oppoſes by violence the execution of a decree, or of any lawful diligence, which the civil magiſtrate is not able by himſelf and his officers to make good, the execution is enforced *manu militari*.

16. A degree arbitral, which is a ſentence proceeding on a ſubmiſſion to arbiters, has ſome affinity with a judicial ſentence, though in moſt reſpects the two differ. A ſubmiſſion is a contract entered into, by two or more parties who have diſputable rights or claims, whereby they refer the differences to the final determination of an arbiter or arbiters, and oblige themſelves to acquieſce in what ſhall be decided. When there are two or more arbiters an overſman is commonly named in the ſubmiſſion, to whom power is given to determine, in caſe the arbiters cannot agree in the ſentence; and ſometimes the nomination of the overſman is left to the arbiters: But, in either caſe, the overſman

no power to decide, unless the arbiters differ in opinion; for the power of decision is given in the first place to them, *Darl.* 161. Where the day within which the arbiters are to decide, is left blank in the submission, practice has limited the arbiters power of deciding to a year. As this has proceeded from the ordinary words of style, empowering the arbiters to determine betwixt and the day of next to come; therefore, where a submission is indefinite, without specifying any time, it ought, like all other contracts or obligations, to subsist for forty years. And, on this ground, a bond obliging the granter to submit debateable claims to certain persons, is perpetual, and productive of an action at any time within the years of prescription, 25. *Feb.* 1630, *Hay*,—3. *Feb.* 1669, *Dofwal*. Submissions, like mandates, expire by the death of any of the parties submitters; see 25. *Feb.* 1639, *Hay*.

How long
submis-
sions are
obliga-
tory.

17. Formerly arbiters who had excepted a submission, might have been compelled by letters of horning to pronounce sentence; which proceeded from the style in which submissions were then executed, by which not only the parties, but the arbiters, consented to the registration of the submission, in order to diligence. As this part of style is now disused, it may be doubted, whether an arbiter who has accepted the office, may, like a mandatary, throw it up at pleasure; see *F.* 30. *June* 1699, *Chiefly*, and *l.* 3. § 1. *de rec. et qui*. This is certain, that he cannot now be compelled by summary diligence to decide. As arbiters are not vested with jurisdiction, they cannot compel witnesses to make oath before them; or ha-

Can arbi-
ters be
compelled
to decide?

Arbiters
cannot
grant
warrant

for citing witnesses, vers of writings to exhibit them; but this defect is supplied by the court of session, who, at the suit of the arbiters, 6. Jan. 1670, Ker, or of either of the parties, F. 26. June 1696, Stevenson, will grant warrant for citing witnesses, or for the exhibition of writings. For the same reason, the power of arbiters is barely to decide; the execution of the decree belongs to the judge. Where the submitters consent to the registration of the decree arbitral, performance may be enforced by summary diligence.

They cannot exceed the powers given them.

18. The power of arbiters is wholly derived from the consent of parties. Hence, where their powers are limited to a certain day, they cannot pronounce sentence after that day; tho' they may, *in ipso termino*, i. e. on the very day betwixt and which the parties impowered them to decide, F. 30. June 1694, Wilson: Nor can they subject parties to a penalty higher than that which they have agreed to in the submission, 24. Feb. 1739, Cred. of Boquhan. And where a submission is limited to special claims, sentence pronounced on subjects not specified in the submission is null, as being *ultra vires compromissi*.

The powers of arbiters are amply interpreted.

19. But, on the other part, as submissions are designed for a most favourable purpose, the amicable composing of differences, the powers thereby conferred on arbiters receive an ample interpretation. For this reason, a general submission of all questions and claims between the parties, imports a power to the arbiters to decide upon claims, not only of moveable, but of heritable bonds, 15. Dec. 1631, Kincaid. Hence also, where arbiters in a special submission

sion decree mutual general discharges to be granted *hinc inde*, the decree is nevertheless valid, in as far as it relates to the claims specified in the submission; and the effect of the general discharge is by a favourable interpretation restricted to these claims, *F. 25. Dec. 1702, Crawford*. In like manner, tho', by the Roman law, a decree arbitral which decided only part of the claims submitted, and left the rest open, was null, *l. 19. § 1. de rec. et qui*. such partial decree is effectual by our customs, 20. *March 1630, Stark*: Yet, to prevent cavilling, that power, where it is intended to be given to arbiters, is by the present style specially expressed in the submission. Where the submitters have mutual claims against one another, a decree arbitral which determines only those on one part, and leaves all on the other undetermined, is null, 30. *June 1625, Falconer*; for it can, in no case, be presumed to be the meaning of parties, that one of them shall have the benefit of a final decision on the claims competent to him, while the other is left to make good all his by a law-suit.

20. Our more ancient law, by which decrees arbitral might be reduced on the iniquity of the sentence, or enormous prejudice of the party, defeated the principal design of submissions, viz. the cutting off law suits; and was hardly reconcileable to the express compact of the submitters, by which they agree to acquiesce in the decision of the arbiter, *l. 27. § 2. de rec. et qui*. But, by *Reg. 1695, § 25.* decrees arbitral are declared not reducible upon any ground, except corruption, bribery, or falsehood.

TIT.

TIT. 4. *Of Crimes.*

Crimes,

public,

and private.

Dole is essential to crimes ;

THE word *crime*, in its most general sense, includes every breach, either of the law of God, or of our country. In a more restricted meaning, it signifies such transgressions of law as are punishable by courts of justice. Crimes were, by the Roman law, divided into public and private. Public crimes were those that were expressly declared such by some law or constitution, *l. 1. de publ. judic.* and which, on account of their more atrocious nature and hurtful consequences, might be prosecuted by any member of the community, § 1 *Inst. cod. 1.* Private crimes could be pursued only by the party injured, and were generally punished by a pecuniary fine to be applied to his use. By the law of Scotland, no private party, except the person injured, or his next of kin, can accuse criminally : But the King's Advocate, who in this question represents the community, has a right to prosecute all crimes *in vindictam publicam*, tho' the party injured should refuse to concur. Smaller offences, as petty riots, injuries, &c. which do not demand the public vengeance, pass generally by the appellation of delicts, and are punishable only by a small pecuniary mulct, or perhaps by a short imprisonment.

2. It is of the essence of a crime, that there be an intention in the actor to commit it ; for an action, in which the will of an agent has no part, is not a proper object either of rewards or punishments :

punishments : Hence arises the rule, *crimen dolo* yet negli-
contrahitur. Simple negligence does not there- gence is
fore constitute a proper crime, *l. 7. ad leg.* in some
Corn. de fizar. : Yet where it is extremely gross, cases pu-
it may be punished arbitrarily or *extra ordinem* ; nishable.
see *l. 11. de incend. ruin. naufr.* Far less can we Involun-
reckon in the number of crimes, involuntary tary ac-
actions, the first cause of which is not in the actions.
gent ; or those committed by an idiot or fu- Actions
rious person : But lesser degrees of fatuity, commit-
which only darken reason, will not afford a ted by i-
total defence, though they may save from the diots.
poena ordinaria. Actions committed in drunk- Actions
eness are not, as to this question, to be confi- commit-
dered as involuntary, seeing the drunkenness ted in
itself, which was the first cause of the action, drunken-
is both voluntary and criminal. ness.

3. On the same principle, such as are in a Infants
state of infancy, or in the confines of it, are cannot
incapable of a criminal action ; dole not being commit
incident to that age, *l. 12. ad leg. Corn. de fizar.* crimes.
The Roman law asserts, in general, that crimes Can pupils
are not imputable to pupils, *l. 22. pr. ad leg. Corn.* commit
de fals. ; but the precise age at which a person them ?
becomes capable of dole, being fixed neither
by nature nor by statute, is by our practice to
be gathered by the judge, as he best can, from
the understanding and manners of the person
accused. Where the guilt of a crime arises
chiefly from statute, the actor, if he is under
puberty, can hardly be found guilty ; but,
where nature itself points out its deformity, he
may, if he is *proximus pubertati*, be more easily
presumed capable of committing it : Yet, even
in that case, he will not be punished *poena ordi-*
naria.

Accessories,
or
art and
part;

4. One may be guilty of a crime, not only by perpetrating it himself, but by being accessory to a crime committed by another; which last is by civilians styled *ope et consilio*, l. 50. § 3. *de furt.* and, in our law phrase, art and part. A person may be guilty, art and part, either by given advice or counsel to commit the crime; or, 2. By given warrant or mandate to commit it; or, 3. By actually assisting the criminal in the execution. A bare advice does not seem, by the Roman law, to have inferred guilt, l. 36. *pr. de furt.*; contrary to the practice of most other nations. It is generally agreed by doctors, that, in the more atrocious crimes, the adviser is equally punishable with the criminal; and that in the slighter, the circumstances arising from the adviser's lesser age, the jocular or careless manner of giving advice, &c. may be received as pleas for softening the punishment. One who gives mandate to commit a crime, as he is the first spring of action, seems more guilty than the person employed as the instrument in executing it; yet the actor cannot excuse himself under the pretence of orders which he ought not to have obeyed. How far the commands of a superior may, in certain cases, either free entirely from punishment, or mitigate it, is explained by *Mackenzie, Crim. Treat. Tit. Art and Part. § 5. 6*

or assist-
ance.

5. Assistance may be given to the committer of a crime, not only in the actual execution, but previous to it, by furnishing him with poison, arms, or the other means of perpetrating it; but, if he who thus assists, had no reason to believe that these instruments were intended for

for a criminal purpose, no guilt can be inferred against him. That sort of assistance, which is not given till after the criminal act, and which is commonly called abetting, tho' it be of itself criminal, does not infer art and part of the principal crime; as if one should favour the escape of a criminal, knowing him to be such, or conceal him from justice. But if, previous to the commission of the crime, one should promise protection to the criminal, it will involve both in equal guilt; for nothing can be a stronger incitement to crimes than the assurance of being screened or protected from punishment.

6. Those crimes that are, in their consequences, most hurtful to society, are punished capitally, or by death; others escape with a lesser punishment, sometimes fixed by statute, and sometimes arbitrary, *i. e.* left to the discretion of the judge, who may exercise his jurisdiction, either by fine, imprisonment, or a corporal punishment. Where the punishment is left by law to the discretion of the judge, he can in no case extend it to death; for where the law intends to punish capitally, it says so in express words, and leaves no liberty to the judge to modify: But where, in any of our ancient laws, *L. B. c. 132.—1457, c. 77. &c.* the life of the offender is put in the mercy or will of the King, it is probable that the judge, in place of pronouncing sentence himself, left it to the Sovereign, who inflicted sometimes a capital, and sometimes a lesser punishment, on the person guilty, according to his demerit. The single escheat of the criminal falls on conviction, in all capital trials, tho' Crimes punished capitally. Arbitrary punishment never extended to death.

fer single
escheat.

the sentence should not express it, for, if the bare non-appearance in a criminal prosecution draws this forfeiture after it, 2. 5. 26. 27. much more ought the being convicted of a capital crime to infer it.

Blasphemy.

7. Certain crimes are committed more immediately against God himself; others, against the state; and a third kind, against particular persons. The chief crime in the first class, cognisable by temporal courts, is blasphemy, under which may be included atheism. This crime consists in the denying or vilifying the Deity, by speech or writing. Blasphemers were punished capitally both by the Jewish law, *Lev.* xxiv. 16. and by the Roman, *Nov.* 77. All who curse God, or any of the persons of the blessed Trinity, are by our law, 1661, *c.* 21. to suffer death, even for a single act; and those who deny him, if they persist in their denial. This act is ratified by 1695, *c.* 11. which also makes the denial of a providence, or of the authority of the holy Scriptures, criminal; and punishable capitally for the third offence.

Witchcraft.

8. All persons who used witchcraft, sorcery, or necromancy, or pretended skill therein; and all consulters of witches, were punished by death, 1563, *c.* 73. But, by act 9. *Geo.* II. *c.* 5. no prosecution can be carried on for witchcraft or conjuration; and, by the same act, all who undertake, from their skill in any occult science, to tell fortunes, or discover stolen goods, are to suffer imprisonment for a year, stand in the pillory four times in that year, and find surety for their future good behaviour.

Telling fortunes.

9. Some crimes against the state are levelled directly against the supreme power, and strike

at the constitution itself; others discover such a contempt of law, as tends to baffle authority, or slacken the reins of Government. Treason, *Treason, crimen majestatis*, is that crime which is aimed against the majesty of the state; and can be committed only by those who are subjects of that state either by birth or residence. It was high treason, by the law of Scotland, to intend the King's death, to lay any restraint upon his person, or to entice any foreign power to invade his dominions, 1662, c. 2. and to rise in arms, maintain forts, or make treaties with foreign states, without his authority, 1661, c. 5. Certain facts, tho' not in their nature treasonable, were declared by statute to be punishable as treason, viz. theft by landed men, 1587, c. 50. murder under trust, *ibid.* c. 51. wilfully setting fire to coal-heughs, 1592, c. 146. or to houses or corns, 1528, c. 8. and assassination, 1681, c. 15. Treason was punished by death, and by the forfeiture to the King of the traitor's estate, both real and personal: But this forfeiture did not cut off the right of the creditors, tacksmen, superiors, vassals, heirs of entail, or widows of the forfeiting persons, 1690, c. 33. Treason might, by our law, have been tried after the death of the traitor, and sentence condemnatory upon such trial carried the estate to the crown, 1540, c. 69.; which was indeed agreeable to the *jus novum* of the Romans, l. 8. pr. G. ad leg. Jul. maj.; but contrary to the rules of law, and the dictates of humanity.

10. Soon after the union of the two kingdoms in 1707, the laws of treason, then in force in England, were made ours by 7. An. c. 21. ^{English laws of treason made both ours}

both with regard to the facts constituting that crime, to the forms of trial, the corruption of blood, and all the penalties and forfeitures consequent on it. By this act, the facts that inferred statutory treason by our former law are declared simply capital crimes.

Treason
what, by
the laws
of Eng-
land.

11. It is high treason, by 25. *Edw. III. c. 2.* to imagine the death of the King, Queen-consort, or of the heir apparent of the crown; to levy war against the King, or adhere to his enemies; to counterfeit the King's coin, or his great or privy seal; to kill the chancellor, treasurer, or any of the twelve judges of England, while they are doing their offices; which last article is by the forenamed act 7. *An.* applied to Scotland, in the case of slaying any judge of the session or of justiciary, sitting in judgment. Those who wash, clip, or lighten the proper money of the realm, 5. *Eliz. c. 11.*—18. *Eliz. c. 1.*; who advisedly affirm by writing or printing, that the Pretender has any right to the crown, or that the King and Parliament cannot limit the succession to it, 6. *An. c. 7.* or who hold correspondence with the Pretender, or any person employed by him, 13. *Gul. III. c. 3.* are also guilty of treason.

Forms of
proceed-
ing in
treason.

12. The forms of proceeding in the trial of treason, whether against Peers or commoners, are set forth in a small treatise, published by order of the house of Lords in 1709, subjoined to a collection of Statutes concerning treason. By the conviction upon this trial, the whole estate of the traitor forfeits to the crown. His blood is also corrupted, so that, on the death of an ancestor, he cannot inherit; and the estate which he cannot take, falls to the immediate

Pains of
treason.

superior

superior as escheat, *ob defectum heredis*, without distinguishing whether the lands hold of the crown or of a subject, *Coke 1. inst. vol. 1. l. 1. c. 1. § 4.*—*Hale Plac. Cor. vol. 1. c. 27.* By the aforesaid act 7. *An.* it is provided, that no attainder for treason shall, after the Pretender's death, hurt the right of any person, other than that of the offender, during his natural life: but this provision is, by a posterior act, 17. *Geo. II. c. 39.* not to take place, as long as any of the sons of the Pretender shall be alive. It was for some time doubted, whether the act 1690, *c. 33.* saving the rights of creditors, &c. was repealed by the act 7. *An.* subjecting traitors, tried in Scotland, to the pains and forfeitures of the English law; since the excluding of creditors is not properly a penalty on the traitor, and our private rights are by *art. Union, c. 18.* declared unalterable, except for the evident utility of the subject, which article might seem to require an express repealer of so beneficial a statute; see *farther report of Commissioners of inquiry, 1719, p. 15. 21. 23.* &c. But it now seems to be an agreed point, that the rights, even of third parties, in the case of forfeiture on treason, must be determined by the law of England.

13. Misprision of treason, from *Meprendere*, Misprision, is the overlooking or concealing of treason. It is inferred by one's bare knowledge of the crime, and not discovering it to a magistrate, or other person entitled by his office to take examinations; tho' he should not in the least degree assent to it. The fore said act 7. *An.* makes the English law of misprision ours. Its punishment is, by the law of England, perpetual imprisonment,

prisonment, together with the forfeiture of the offender's moveables, and of the profits of his heritable estate, during his life, *Hale Plac. Cor. vol. 1. c. 28.*; that is, in the stile of our law, his single and liferent escheat.

Sedition,

verbal, or
leasing-
making;

real.

Riot-act,

Corrup-
tion in
judges.

Theft.
bote.

14. The crime of sedition consists in the raising commotions or disturbances in the state. It is either verbal or real. Verbal sedition, or leasing-making, is inferred from the uttering of words tending to create discord between the King and his people. It was formerly punished by death, and the forfeiture of goods; 1425, *c. 43.*—1540, *c. 83.*; but now, either by imprisonment, fine, or banishment, at the discretion of the judge, 1703, *c. 4.* Real sedition is generally committed, by convocating together any considerable number of people, without lawful authority, under the pretence of redressing some public grievance, to the disturbing of the public peace. Those who are convicted of this crime are punished by the confiscation of their goods; and their lives are to be at the King's will, 1457, *c. 77.* For preventing rebellious riots and tumults, it is enacted, 1. *Geo. I. St. 2. c. 5.* that if any persons, to the number of twelve, shall assemble, and being required by a magistrate or constable to disperse, shall nevertheless continue together for an hour after such command, the persons disobeying shall suffer death, and the confiscation of moveables.

15. Judges who, wilfully or through corruption, use their authority as a cover to injustice or oppression, are punished with the loss of honour, fame, and dignity, 1540, *c. 104.* Under this head, may be classed theftbote (from

bote,

bote, compensation), which is the taking a consideration in money or goods from a thief to exempt him from punishment, or connive at his escape from justice. A sheriff or other judge, guilty of this crime, forfeits his life and goods, 1436, c. 137.: And, by a posterior statute, 1515, c. 2. even a private person, who takes theftbote, suffers as the principal thief. The buying of disputed claims, concerning which there is a pending process, by any judge or member either of the session, or of an inferior court, is punished by the loss of the delinquent's office, and all the privileges thereto belonging, 1594, c. 216. Buying of claims.

16. Deforcement is the opposition given, or resistance made, to messengers or other officers, while they are employed in executing the law. The court of session is competent to this crime, 1581, c. 118: and by the last statute relating to it, 1592, c. 150. it is made punishable with the confiscation of moveables, the one half to the King, and the other to the creditor at whose suit the diligence was used. Where the deforcement is brought only *ad civilem effectum*, for recovering the debt and damages, the statute is amply interpreted; and consequently process will be sustained, if the messenger should be any how hindered in the execution of the diligence, tho' without the effusion of blood; but, in a criminal trial, where the conclusion is penal, effusion of blood must be libelled, in terms of the act 1592. Thus also, though the words of the act are levelled only against the debtor, or person commanded by him, practice has extended it, in a *civil* action, against those who Deforcement; session, competent to it.

who interpose to save their friend from diligence, without being desired by the debtor.

Deforcement of officers of the revenue.

17. Deforcement of the officers of the customs, by persons to the number of eight or upwards, was punished by transportation to America, for a term of years not exceeding seven, 6. *Geo.* I. c. 21. § 34.: But now, by 19. *Geo.* II. c. 34. armed persons, to the number of three or more, assisting in the illegal running, landing, and exporting of prohibited or uncustomed goods, or any who shall resist, wound, or maim any officer of the revenue, in the execution of his office, shall suffer death, and the confiscation of moveables.

Breach of arrestment.

18. Breach of arrestment, 3. 6. 6. is a crime of the same nature with deforcement, as it imports a contempt of the law, and of our judges; and it is subjected to the pains inflicted on deforcement, by 1581, c. 118. viz. an arbitrary corporal punishment, and the escheat of moveables; with a preference to the creditor for his debt, and for such farther sum as shall be modified to him by the judge. Under this head of crimes against good government and police, may be reckoned the forestalling of markets, that is, the buying of goods intended for a public market, before they are carried there; which, for the third criminal act, infers the escheat of moveables, 1592, c. 148.; slaying salmon in forbidden time, 1503, c. 27. offences against the acts for preserving the game, 2. 1. 6. destroying plough-graith in time of tillage, and slaying or houghing horses or cows in time of harvest, 1587, c. 82. and destroying or spoiling growing timber, 1698, c. 16.—1. *Geo.* I. St. 2 c. 48.

Forestalling of markets.

Offences against the game, planting, &c.

19 Crimes against particular persons may be directed, either against life, limb, liberty, chastity, goods, or reputation. Murder is the wilful taking away of a person's life, without a necessary cause. The distinction which obtained in our ancient law between slaughter premeditated, or upon *forethought felony*, and that which was committed on a sudden, or *chaud mella*, indulging to the last the privilege of girth and sanctuary, *St. Rob II. c. 9.*—1555, *c. 31.* was taken off by 1661, *c. 22.* (copied after 1649, *c. 19.*) which supposes homicide to be a capital crime, without any such distinction. Casual homicide, where the actor is in some degree blameable, and homicide in self-defence, where the just bounds of defence have been exceeded, are punished arbitrarily by this act, but the slaughter of night thieves, house-breakers, assistants in masterful depredations, or rebels denounced for capital crimes, may be committed with impunity. The crime of demem-
 bration, or the cutting off of a member, is joined with that of murder, in 1491, *c. 28.*; but, in practice, its punishment has been restricted to the escheat of moveables, and an assythment or indemnification to the party. Mutilation, or the disabling of a member, is punished at the discretion of the judge. See *Pitt-medden* on demem-bration, *p. 65.*

20. Self-murder is as highly criminal as the killing our neighbour; and, for this reason, our law has, contrary to the rule, *crimina morte extinguuntur*, allowed a proof of the crime, after the offender's death, that his single escheat might fall to the King or his donatary. To this end, an action must be brought, not
 3 Q before

before the justiciary, but the session, because it is only intended *ad civilem effectum*, for proving and declaring the self-murder; and the next of kin to the deceased must be made a party to it.

Parricide. 21. The punishment of parricide, or of the murder of a parent, is not confined, by our law, to the criminal himself. All his posterity in the right line are declared incapable of inheriting; and the succession devolves on the next collateral heir, 1504, c. 220. Even the cursing or beating of a parent infers death, if the person guilty be above sixteen years; and an arbitrary punishment, if he be under it, 1661, c. 20.

Murder of infants. A presumptive or statutory murder is constituted by 1690, c. 21. by which any woman who shall conceal her pregnancy during its whole course, and shall not call for, or make use of help in the birth, is to be reputed the murderer, if the child be dead or a missing. This act was intended to discourage the unnatural practice, which yet continues too frequent, of women making away with their children begotten in fornication, to avoid church censures.

Duelling. 22. Duelling, *bellum inter duos*, is the crime of fighting in single combat, on previous challenges given and received. The single combat was authorised by the Gothic polity, as a method of determining both civil and criminal questions; but fighting in a duel, without licence from the King, is by 1600, c. 12. made punishable by death. This act is ratified by 1696, c. 35. which also enacts, that whatever person, principal or second, shall give a challenge to fight a duel, or shall except a challenge, or otherwise engage therein, shall be punished

by banishment and escheat of moveables, tho' no actual fighting should ensue.

23. Haimsucken, from *haim*, home, and *Haimfuecken*, to seek or pursue), is the assaulting or beating of a person in his own house. The punishment of this crime is no where defined, except in the books of the Majesty, which make it the same as that of a rape. *l. 4. c. 9. 10.*, and it is, like rape, capital by our practice, *Mack. Cr. Tr. tit. Haimsucken*. The assault must be made in the proper house of the person assaulted, where he lies and rises daily and nightly, *ibid. l. 1. c. 9. § 1*; so that neither a public house, nor even a private, where one is only transiently, falls within the law.

24. Any party to a law suit, who shall slay, wound, or otherwise invade his adversary, at any period of time between executing the summons and the complete execution of the decree, or shall be accessory to such invasion, shall lose his cause, *1584. c. 138 — 1594. c. 219*. As these acts direct, that proof shall be previously taken of the invasion, by the justice or other competent judge, the court of session sustain themselves judges, because they are truly competent to all causes where the conclusion is merely civil. The sentence pronounced on this trial, against him who has committed the battery, is by the act declared not subject to reduction, either on the head of minority, or any other ground whatever: And, if the person prosecuted for this crime shall be denounced for not appearing, his liferent, as well as single escheat, falls upon the denunciation.

25. The crime of wrongous imprisonment is described, *1701, c. 6*. It is inferred, by granting

Battery,
pendente
lite.

Wrong-
ous impri-
sonment.

ing warrants of commitment in order to trial, proceeding on informations not subscribed, or without expressing the cause of commitment; by receiving or detaining prisoners on such warrants; by refusing to a prisoner a copy of the warrant of commitment; by detaining him in close confinement, above eight days after his commitment; by not releasing him on bail, where the crime is bailable; and by transporting persons out of the kingdom, without either their own consent, or a lawful sentence; see below, § 48. The persons guilty of wrongous imprisonment are punished by a pecuniary mulct, from 600 down to *L. 400 Scots*, according to the rank of the person detained; and the judge or other person, acting contrary to the directions of the act, is over and above subjected to pay to the person detained a certain sum *per diem*, proportioned to his rank, and is declared incapable of public trust. All these penalties may be insisted for by a summary action before the session, and are subject to no modification. Private persons may be guilty of this crime, 14. Dec. 1736, *Paterfon*.

Adultery
what.

26 Adultery is the crime by which the marriage bed is polluted. This crime could, neither by the Roman law, *l. 6. § 1. ad. leg. Jul. de adult.* nor the Jewish, *Lev. xx. 10.—Deut. xxii. 22.* be committed, but where the guilty woman was the wife of another: By ours, it is adultery, if either the man or woman be married. We distinguish between simple adultery, and that which is notorious or manifest. Open and manifest adulterers, who continue incorrigible, notwithstanding the censures of the church, were punished, 1551, c.

Notour
adultery.

20. by the escheat of moveables; but, soon thereafter, by 1563, c. 74. the punishment of notorious and manifest adultery was made capital. This crime is distinguished by one or other of the following character: Where there is issue procreated between the two adulterers; or where they keep bed and company together notoriously; or where they give scandal to the church, and are, upon their obstinate refusing to listen to their admonitions, excommunicated, 1581, c. 105. The punishment of Simple adultery, not being defined by statute, is left to the discretion of the judge; but custom has made the falling of the single escheat one of its penalties, 9. Jan. 1662, *Baird*.

27. Bigamy is a person's entering into the engagements of a second marriage, in violation of a former marriage-vow still subsisting. Bigamy, on the part of the man, has been tolerated, in many states, before the establishment of Christianity, even by the Jews themselves; but it is prohibited by the precepts of the gospel, and it is punished by our law, whether on the part of the man, or of the woman, with the pains of perjury, 1551, c. 19.

28. Incest is committed by persons who stand within the degrees of kindred forbidden in *Lev. xviii.*; and it is punished capitally by 1567, c. 14. The same degrees are prohibited in affinity, as in consanguinity, *Lev. xviii. 14. et seqq.* As this crime is repugnant to nature itself, it is an ill-founded opinion, that incest cannot be committed, but between persons born in lawful marriage; for, in questions of the law of nature, all children, whether lawful

or

or natural, stand on an equal footing: *Civilis ratio civilia jura corrumpere potest, non vero naturalia*. It is difficult, indeed, to bring a legal proof of a relation merely natural, on the side of the father; but the mother may be certainly known without marriage.

Rape.

29. There is no explicit statute making rape, or the ravishing of women, capital; but it is plainly supposed in act 1612, c. 4. by which the ravisher is exempted from the pains of death, only in the case of the woman's subsequent consent, or her declaration that she went off with him of her own free will; and even then, he is to suffer an arbitrary punishment, either by imprisonment, confiscation of goods, or a pecuniary fine.

Theft.

30. Theft is defined, a fraudulent intermeddling with the property of another, with a view of making gain. Neither the law of Moses, nor of Rome, punished theft capitally. By the first, the thief was bound to restore, in some cases, five times the value, in others less, *Exod. xxii. 1. et seqq.*; and by the Roman, either the double or quadruple, according to the circumstances attending the crime. Our ancient law proportioned the punishment of the theft to the value of the goods stolen; heightening it gradually, from a slight corporal punishment to a capital, if the value amounted to thirty two pennies Scots, which, in the reign of David I. was the price of two sheep, *R. M. l. 4. c. 16. § 3.—L. B. c. 121. § 6*. In several later acts, it is taken for granted that this crime is capital, 1587, c. 82.—1606, c. 5. &c. But, where the thing stolen is of small value, we consider it, not as theft, but as pickery, which is

is punished either corporally or by banishment. The breaking of orchards, and the stealing of green wood, is punished by a fine, which arises as the crime is repeated, 1579, c. 84.

31. Theft may be aggravated into a capital ^{Aggrava-} crime, though the value of the thing stolen be ^{ted theft.} trifling; as theft twice repeated, *L. B. c. 121.*

§ 5. or committed in the night, *arg.* 1661, c. 22.; or by landed men; or of things set apart for sacred uses. The receivers and concealers ^{Reset of} of stolen goods, knowing them to be such, ^{theft.} suffer as thieves, *St. Al. II. c. 21.* Those who barely harbour the person of the criminal (*receptatores*) within forty eight hours either before or after committing the crime, are punished as partakers of the theft, 1567, c. 21. Such as sell goods belonging to thieves or lawless persons, who dare not themselves come to market, are punished with banishment and the escheat of moveables, 1587, c. 109.

32. Theft, attended with violence, is called ^{Robbery,} robbery; and, in our old statutes, ^{Rief,} rief, 1477, ^{Stouth-} c. 78. or ^{rief,} stouthrief, 1515, c. 2.; under which ^{Sorning.} claus may be included forning, or the taking of meat and drink by force, without paying for it. Stouthrief came at last to be committed so audaciously, by bands of men associated together, that it was thought necessary to vest all our freeholders with a power of holding courts upon forners and rieurs, and condemning them to death, 1594, c. 227. Nay, all were capi ^{Black-} tally punished, who, to secure their lands from ^{mail.} depredation, paid to the rieurs a yearly contribution, which got the name of *Black-mail*, 1567, c. 21.—1587. c. 102. An act passed, ^{Egypt-} 1609, c. 13. commanding to banishment a band ^{tians.} of

Piracy. of forners, who were originally from *Egypt*, called *Gypsies*, and adjudging to death all that should be reputed *Egyptians*, if found thereafter within the kingdom. Robbery committed on the seas is called piracy, and is punished capitally by the high admiral. Several of the facts which constitute this crime are set forth in a British statute, 8. *Geo. I. c. 24.*

Falsehood. 33. Falsehood, in a large sense, is the fraudulent imitation or suppression of truth, to the damage of another. The lives and goods of persons convicted of using false weights or measures were, by our old law, in the king's mercy; and their heirs could not inherit, but upon a remission, *L. B. c. 132*. The latest statute against this crime, 1607, *c. 2.* punishes it by confiscation of moveables.

Forgery ; 34. That particular species of falsehood, which consists in the falsifying of writings, passes by the name of forgery, and was, by the Roman law, punished capitally, where the atrocity of the fact required it, *l. 22. C. ad leg. Corn. de fals.* By our statute law, the punishment of this crime was at first the amputation of the hand, *St. Al. II. c. 19.*; afterwards proscriptio, banishment, and dismembering of the hand and tongue, joined with the other pains inflicted by the common law, 551, *c. 22.*; and at last it is declared, in general terms, to be the pains due to the committers of falsehood, 1621, *c. 22.* Our practice has now of a long time, agreeable to the Roman law, made the crime capital, unless the forgery be of executions, or other writings of smaller moment; in which case it is punished arbitrarily, *Fel.* 1739, *Macvicar.*

its punishment.

35. The writing must not only be fabricated, but put to use or founded on, in order to infer this crime. Any person who founds on a writing alledged to be false, may be put to declare judicially, whether he is willing to abide by it as a true deed. If he declines to abide by it, the deed is pronounced false; but he is not absolved, on his passing from it, if evidence be brought that he was accessary to the forgery, 1621, c. 22. Frequently the user of the deed offers to abide by it *qualificatè*, or under protestation that it came fairly into his hands, and that he had no accession to the crime. The immediate receiver of a writing must, in all cases, abide by it simply; but heirs and singular successors are, in certain favourable cases, allowed to do it under a quality, the import of which is to be afterwards considered by the judge.

The false writing must be used.

What, if the user abide by it.

36. The trial of forgery, though it be strictly criminal, is proper to the court of session, 1. 3. 11.; but, where improbation is moved against a deed by way of exception, the inferior judge, before whom the action lies, is competent to it *ad civilem effectum*, arg. 1557, c. 62. He who pleads improbation, either by way of action or exception, was, by said act 1557, obliged to give security to pay a certain sum at the discretion of the judge, if he should succumb in his allegation: Afterwards, by an act of sederunt, mentioned in *Books* S. 8. Jan. 158, 4, in place of security for the sum modified, it was to be consigned; but these acts are now quite in disuse, where the improbation is undertaken by way of action. When it is pleaded as an exception, our practice, to dis-

The court competent to forgery.

Consignation in improbations.

courage affected delays, obliges the defender, who moves it, to consign L. 40 Scots; which he forfeits, if his plea shall appear calumnious.

37. The proof in improbation is either direct or indirect. The first is, by the testimony of the writer of the deed, and of the witnesses who attest it, called the instrumentary witnesses. A proof by the indirect manner, is gathered from circumstances and extrinsic arguments. If one of the two instrumentary witnesses should depose that the writing is true, and the other, that he did not attest it, the writing will be annulled, being supported by the testimony of one witness only; but the user will not be subjected to the pains of falsehood, because he is justified by the oath of that witness. Where witnesses attest a deed without knowing the granter and seeing him subscribe, or hearing him own his subscription, the deed is not only improbative, but such witnesses are declared accessory to forgery, 1681, c. 5. Yet, as this sort of accession is merely statutory, the punishment ought to be restricted, at the discretion of the judge. The circumstances by which forgeries are most frequently discovered in the indirect way, is, *comparatione literarum*, by comparing the hand writing of the writer, or the subscription of the granter, as it stands in other genuine writings, with that which appears in the deed in question; by the manner of spelling; by the agreement or disagreement of the stile of the deed, with that of the age in which it is said to have been executed; by the stamp of the paper; by a false date, or by a proof that the alledged granter was not, at the date.

Direct,

and indirect.

date. in that place where the deed bears to have been signed; which last is called *alibi*.

38 Where a person, found guilty of forgery by the court of session, is by them remitted to the justiciary, 1. 3. 11. an indictment is there exhibited against him, and a jury sworn, before whom the decree of session is produced, in place of all other evidence of the crime, in respect of which the jury find the pannel guilty; so that that decree, being pronounced by a competent court, is held as full proof, or, in the stile of the bar, as *probatio probata*.

Forgery when capital, is remitted to the justiciary.

39. Perjury, which is the judicial affirmation of a falsehood on oath, really constitutes the *crimen falsi*; for he who is guilty of it does, in the most solemn manner, substitute falsehood in the place of truth. To constitute this crime, the violation of truth must be deliberately intended by the swearer; and therefore reasonable allowances ought to be given to forgetfulness or misapprehension, according to his age, health, and other circumstances. The breach of a promissory oath does not infer this crime; for he who promises on oath, may sincerely intend performance when he swears, and so cannot be said to call on God to attest a falsehood. Tho' an oath, however false, if made upon reference in a civil question, concludes the cause, the person perjured is liable to a criminal trial; for the effect of the reference can go no further than the private right of the parties.

Perjury;

40. Notwithstanding the mischievous consequences of perjury to society, it is not punished capitally, either by the Roman law, l. 13. C. de test. or by ours. The special punishment of swearing falsely on an assize, was confiscation

its punishment;

before
whom
compe-
tent

tion of moveables, imprisonment for a year, and infamy, *R. M. l. 1. c. 14.*; which punishment came, in the course of time, to be transferred to perjury in general, with a small variation, 1555, *c. 47.* The Court of Session is competent to perjury *incidenter*, when, in any examination upon oath, taken in a cause depending before them, a person appears to have sworn falsely; but, in the common case, that trial is proper to the justiciary. Subornation of perjury consists in tampering with persons who are to swear in judgment, by directing them how they are to depose; and it is punished with the pains of perjury, said 1555, *c. 47.*

Stellio-
nate.

41. The crime of stellionate, from *stellio*, *Pin. hist. nat. l. 30 c. 10.* includes every fraud which is not distinguished by a special name; but is chiefly applied to conveyances of the same numerical right, granted by the proprietor to different disponees, *l. 3. § 1. Stellion.—1592, c. 140.* The punishment of stellionate must necessarily be arbitrary, to adapt it to the various natures and different aggravations of the fraudulent acts, *l. 3. § 2 Stellion.* The persons guilty of that kind of it, which consists in granting double conveyances, are by our law declared infamous, and their lives and goods at the King's mercy, 1540, *c. 105.* The cognizance of fraudulent bankruptcy is appropriated to the court of session, who may inflict any punishment on the offender, that appears proportioned to his guilt, death excepted, 1696, *c. 5.*

Granting
of double
rights.

Fraudu-
lent bank-
ruptcy.

Usury;

42. The crime of usury, before the reformation, consisted in the taking of *any interest* for the use of money; and now in taking an higher

higher rate of interest than is authorised by law. It is divided into *usura manifesta*, or direct; and *velata*, or covered. One may be guilty ^{direct.} of the first kind, either where he covenants with the debtor for more than the lawful interest on the loan of money; or where one receives the interest of a sum before it is due, since thereby he takes a consideration for the use of money before the debtor has really got the use of it, 1621, c. 28. Where a debt is clogged with an uncertain condition, by which the creditor runs the hazard of losing his sum, he may covenant for an higher interest than the legal, without the crime of usury; for there the interest is not given, merely in consideration of the use of the money, but of the danger undertaken by the creditor. Hence, one who lends money upon bottomry, the repayment of which depends upon the safe return of the ship on which the money is lent, may lawfully take a rate of interest proportioned to his risk. ^{Under-taking a risk, excludes usury.} ^{Bonds of bottomry.}

43. Covered usury is that which is committed under the mask, not of a loan, but of some other contract; e. g. a sale, or an improper wadset. Thus a back tack, which is given by a wadsetter to the reverier, for payment of a tack duty exceeding the legal interest of the sum lent, is accounted a loan, tho' covered under the contracts of wadset and location; and consequently inters usury: and, in general, all obligations entered into with an intention of getting more than the legal interest for the use of money, however they may be disguised, are declared usurious by 1597, c. 247. As a further guard against this crime, the taking more than the legal interest for the forbearance of payment ^{by a British act.}

payment of money, merchandise, or other commodities, by way of loan, exchange, or other contrivance whatever ; or the taking a bribe for the loan of money, or for delaying its payment when lent, is declared usury, 12 *An. stat.* 2. c. 16.

Usury,
how pun-
ished ;

44. The punishment of usury was, by said act 1597, declared to be the escheat of moveables, annulling the usurious contract, and a forfeiture of the principal sum lent, with the lawful interest due upon it, to the King or his donatory, with the burden of restoring to the private party, in case he should concur in the prosecution, the unlawful profits given by him to the creditor. But, by the aforesaid act of Q. Anne, the usurious obligations is not only declared void, but the creditor, if he has received any unlawful profits, forfeits the treble value of the sums or goods lent. Usury, when it is to be pursued criminally, must be tried by the justiciary ; but where the libel concludes only the voiding of the debt or restitution, the session is the proper court.

before
whom
compe-
tent.

Injury,

verbal,

45. Injury, in its proper acceptation, is the reproaching or affronting our neighbour. Injuries are either verbal or real. A verbal injury, when directed against a private person, consists in the uttering contumelious words, which tend to expose our neighbours character by making him little or ridiculous. Where these offensive words are uttered in the heat of a dispute, and I poke to the person's face, the law does not presume any malicious intention in the utterer, whose resentment generally subsides with his passion ; and yet, even in that case, the truth of the injurious words remains

abolishes

absolves entirely from punishment. It does not seem that the twitting one with natural defects, without any sarcastical reflections, tho' it be inhumane, falls under this description, as these imply no real reproach in the just opinion of mankind. Where the injurious expressions have a tendency to blacken one's moral character, or fix some particular guilt upon him, and are deliberately repeated in different companies, or handed about in whispers to confidants, it then grows up to the crime of slander, agreeable to the distinction of the Roman law, *l. 15. § 12. de inj.*: And where a person's moral character is thus attacked, the *animus injuriandi* is commonly inferred from the injurious words themselves, unless special circumstances be offered to take off the presumption; *ex. gr.* that the words were uttered in judgment in one's own defence or by way of information to a magistrate, and had some foundation in fact. The cognisance of slander before was, and perhaps is to this day, proper to the commissaries, who, as the *judices Christianitatis*, were the only judges of scandal; but, for some time past, bare verbal injuries, or hasty words uttered intemperately *in rixa*, have been tried by other criminal judges, and even by the session, *New Coll. 147.* It is punished, either by its punishment, a fine, proportioned to the condition of the persons injuring and injured, and the circumstances of time and place, *l. 7. § 8. de injur.*; or, if the injury import scandal, by publicly acknowledging the offence; and frequently the two are conjoined. The calling one a bankrupt is not, in strict speech, a verbal injury, as it does not affect the persons moral character; yet, as it

Real in-
jury.

it may hurt his credit in the way of business, it founds him in an action of damages, which must be brought before the judge ordinary. A real injury is inflicted by any fact by which a person's honour or dignity is affected; as striking one with a cane, or even aiming a blow without striking; spitting in one's face; assuming a coat of arms, or any other mark of distinction proper to another, &c. The composing and publishing defamatory libels may be reckoned of this kind. Real injuries are tried by the judge ordinary, and punished, either by fine or imprisonment, according to the demerit of the offenders.

Criminal
jurisdic-
tion, *ratio-
ne domici-
lii*;

*ratione
delicti.*

46. After having shortly explained the several crimes punishable by our law, this treatise may be concluded, with a few observations on criminal jurisdiction, the forms of trial, and the methods by which crimes may be extinguished. Criminal jurisdiction is founded, 1. *Ratione domicilii*, if the defender dwells within the territory of the judge; for every criminal judge must have a power inherent in him, of punishing all offenders subject to his jurisdiction. Vagabonds who have no certain domicile, may be tried wherever they are apprehended. 2. *Ratione delicti*, if the crime was committed within the territory; because, in this way, those under whose eye the fact was perpetrated, will, by seeing it also punished, be most effectually deterred from copying after such examples, *St. Gul. c. 18.*; and the just resentment of the person injured or his friends will be most amply satisfied, *l. 28. § 15. de poen.* And indeed by several old temporary acts, 1436, *c. 148* — 1491, *c. 28.* criminals were to be tried by that judge

judge alone within whose territory the crime was committed. Treason is triable by the English law, in that county alone where it is committed: But, by 19. Geo. II. c. 9. it was made lawful to try treasons committed, *anno* 1745, in any county that the King should appoint; and by a temporary act now expired, 21. Geo. II. c. 19. treason committed in certain Scots counties, was made triable by the court of justiciary, wherever it should sit.

47. No criminal trial can proceed, unless the person accused is capable of making his defence. Absents therefore cannot be tried; nor fatuous nor furious persons, *durante furore*, even for crimes committed while they were in their senses. For a like reason, minors who had no curators could not, by the Roman law, be tried criminally, *l. 4. C. de aut. praest.* lest they should from the heat of youth, either speak out or conceal that which, if it had not been spoken or concealed, might have profited them. This privilege was still further stretched by *R. M. l. 3. c. 32. § 15.* which exempted all minors from such prosecutions; but our present practice considers every person who is capable of dole, to be also sufficiently qualified for making his defence in a criminal trial.

48. No person can be imprisoned in order to trial for any crime, without a warrant in writing expressing the cause, and proceeding upon a subscribed information, 1701, c. 6. unless in the case of indignities done to judges, riots, and the other offences specially mentioned in the statute. Every prisoner committed in order to trial, if the crime of which he is accused be not capital, is entitled to be released upon bail, What persons cannot be tried criminally. Commitment of criminals. Bail taken in crimes not capital.

A criminal may insist for his trial.

bail, the extent of which is to be modified by the judge, not exceeding 6000 merks Scots for a nobleman, 3000 for a landed gentleman, 1000 for any other gentleman or burghers, and 300 for any inferior person, *ibid.*; which sums, to which the bail to be taken is limited, are doubled by 11. *Geo. I. c. 26. § 11.* That persons who, either from the nature of the crime with which they are charged, or from their low circumstances, cannot procure bail, may not lie forever in prison untried, it is made lawful by the said act 1701, to every such prisoner, to apply to the criminal judge, that his trial may be brought on. The judge must, within twenty four hours after such application, issue letters directed to messengers, for intimating to the prosecutor to fix a diet for the prisoner's trial, within sixty days after the intimation, under the pain of wrongous imprisonment: And, if the prosecutor does not insist within that time, or if the trial is not finished in forty days more, when carried on before the justiciary, or in thirty, when before any other judge; the prisoner is, upon a second application, setting forth that the legal time is elapsed, entitled to his freedom, under the same penalty.

Precognition in order to trial.

49. Upon one's committing any of the grosser crimes, it is usual for a justice of the peace, sheriff, or other judge, to take a precognition of the facts, *i. e.* to examine those who were present at the criminal act, upon the special circumstances attending it, in order to know whether there is ground for a trial, and to serve as a direction to the prosecutor, how to set forth the facts in the libel; but the persons examined may insist to have their declaration cancelled

before

before they give testimony at the trial. Justices of the peace, sheriffs, and magistrates of boroughs, are also authorised to receive informations, concerning crimes to be tried in the circuit-courts, which informations are to be transmitted to the justice-clerk, forty days before the sitting of the respective courts. This method of taking up of dittay is substituted, by 8. *An. c.* 16. § 3. 4. in place of the old one, by the strefs (traistis) and porteous rolls, mentioned 1487, *c.* 99.; see *Skene, voce Traistis*. To discourage groundless criminal trials, all prosecutors, where the defender was absolved, were condemned in costs, as they should be modified by the judge, 1587, *c.* 87.; and besides were subjected to a small fine to be divided between the sisk and the defender: And where the King's Advocate was the only pursuer, his informer was made liable in the payment thereof, 1579, *c.* 78. These statutes sufficiently warrant the present practice, of condemning vexatious prosecutors in a pecuniary mulct, though far exceeding the statutory sum.

Method
of pre-
senting to
the cir-
cuit-
courts.

Penalty
of vexati-
ous pro-
secutions.

50. The forms of trial on criminal accusations, differ much from those observed in civil actions, if we except the case of such crimes as the court of session is competent to, and of lesser offences tried before inferior courts. The trial of crimes proceeds, either upon indictment, which is sometimes used, when the person to be tried is in prison; or by criminal letters, issuing from the signet of the justiciary. In either case, the defender must be served with a full copy of the indictment or letters, and with a list of the witnesses to be brought against him, and of the persons who are to pass on the inquest, 1672, *c.* 16.

Trial, ei-
ther by
indict-
ment or
criminal
letters.

c. 16. § 11. concerning the justice court; and fifteen free days must intervene, between his being so served, and the day of appearance.

Caution to be found by the private prosecutor,

When the trial proceeds upon criminal letters, the private prosecutor must give security, at raising the letters, that he will report them duly executed to the justiciary, in terms of 1535, *c. 35.*; and the defender, if he be not already in prison, is, by the letters, required to give caution, within a certain number of days after his citation, for his appearance upon the day fixed for his trial: And if he gives none within the days of the charge, he may be denounced rebel, which inters the forfeiture of his moveables.

Accomplices must be inserted in the letters.

51. Formerly, accomplices in crimes, or associates, were not cited in virtue of any special warrant contained in the criminal letters; their names were only inserted in a bill or writing to which the letters referred, and might be struck out at the messenger's pleasure. As messengers, by an abuse of this trust, frequently suffered delinquents to escape for money, it was enacted by 1579, *c. 76.* that all the persons to be cited should be specially mentioned in the body of the criminal letters.

Criminal letters must be special,

52. That part of the indictment, or of the criminal letters, which contains the ground of the charge against the defender, and the nature or degree of the punishment he ought to suffer, is called the libel. All libels must be special, setting forth the particular facts inferring the guilt, and the particular place where these facts were done. The time of committing the crime may be libelled in more general terms, with an alternative as to the month,

or

or day of the month: But the defender will be allowed to prove, that, upon certain days of the time libelled, he was *alibi*; and on such proof, the libel cannot strike against him as to these days. The necessity of special libels obtained in our former law, not only in the trial of principal criminals, but of accessories; but, as it was not practicable in most cases, to libel upon the precise circumstances of accession that might appear in proof, libels against accessories were declared sufficient, if they mentioned, in general, that the persons prosecuted were guilty, art and part, 1592, c. 151.

53. The defender, in a criminal trial, may raise letters of exculpation, for citing witnesses in proof of his defences against the libel, or of his objections against any of the jury or witnesses; which letters must be executed, to the same day of appearance, with that of the indictment or criminal letters. As the right of the defender to prove his defences ought to be as ample and extensive, as that of the pursuer to prove his libel; letters of exculpation ought not to be refused on any relevant defence, though such defence should be inconsistent with the libel; otherwise libels might be so laid, as to cut off the defender from every article of exculpation.

54. The diets of appearance, in the court of justiciary, are peremptory: The criminal letters must be called on the very day to which the defender is cited, 1587, c. 79.; and hence, if no accuser appears, their effect is lost, *instantia perit*, and new letters must be raised. If the libel, or any of the executions, shall to the prosecutor appear informal, or if he be dissident

except against accessories.

Letters of exculpation.

Diets of appearance peremptory. Deserting the diets.

of

of the proof, from the absconding or absence of a necessary witness, the court will, upon a motion made by him, desert the diet *pro loco et tempore*; after which new letters become also necessary. A defender, who does not appear on the day to which he is cited, is declared fugitive, in consequence of which, his single escheat falls. The defender, after his appearance in court, is called the pannel.

Form of
determin-
ing the
relevancy;

without
written
informa-
tions.

55. The two things to be chiefly regarded in a criminal libel, are, 1. The relevancy of the facts, *i. e.* their sufficiency to infer the conclusion; 2. Their truth. The consideration of the first belongs to the judges of the court; that of the other, to the jury or the assize. In trials before the justiciary, after hearing counsel on both sides upon the relevancy, informations *hinc inde*, were, by 1695, c. 4. directed to be offered to the court: But, by the late jurisdiction act, 20. Geo. II. § 41. the judges after the pleading, and minutes thereof made up by the clerk, may forthwith pronounce their interlocutor; reserving power to themselves, in cases of difficulty, to direct informations, either on the relevancy of the libel, the import of a special verdict, the degree of punishment, or any other matter that may be alleged for the pannel, before judgment.

Assize,

56. If the facts libelled be found irrelevant, the pannel is dismissed from the bar; if relevant, the court remits him to the knowledge of an assize. The word *assize* (from *assis*, settled or established) has different significations: It is sometimes taken for the sittings of a court; sometimes for its regulations or ordinances; especially those that fix the standard of weights and

and measures; and it sometimes signifies a jury, either because juries consisted of a fixed determinate number, or because they continued sitting till they pronounced their verdict; see *Skene, voce assisa*. A jury or assize consists of fifteen sworn men (*juratores*) picked out by the court from a greater number, not exceeding forty five, 1579, c. 76—1587, c. 88. who have been summoned for that purpose by the sheriff, and given in a list to the defender, at serving him with a copy of his libel.

57. Anciently, no person could be convicted of the smallest offence, till he was found guilty by a jury of his countrymen: And now for more than a century backwards, inferior judges have tried lesser breaches of the peace *de plano*; yet, to this day, all prosecutions of a higher nature, whether before the supreme or inferior criminal courts, must proceed by jury: And no trial, even for a bloodwit, if pursued before the justiciary, can be carried on without a jury. In the trial of crimes competent to the Court of Session, the fifteen judges may well be considered in the character both of court, and of jury.

58. Crimes cannot, like debts, be referred to the defender's oath; for no person is compellable to swear against himself, where his life, limb, liberty, or estate is concerned; nor even in crimes which infer infamy; because one's good name is, in right estimation, as valuable as his life. The law is, however, forced, in the crime of usury, to depart from some of its common rules, that the crime may be brought to light. Where the usury is found on a written obligation, in the hands of the defender,

or jury.

All pro-
per crimes
must be
tried by
a jury.Probation
of crimes.
Oath of
party.

the

the pursuer may, by an exhibiton, force him to produce it in evidence of the crime, contrary to the rule, *nemo tenetur edere instrumenta contra se*: And where it is not founded upon writing, the crime may be proved by the usurer's own oath, notwithstanding the rule *nemo tenetur jurare in suam turpitudinem*, 1600, c. 7. Crimes therefore are in the general case proveable only by the defender's free confession, or by writing, or by witnesses. No extrajudicial confession, unless it is adhered to by the pannel in judgment, can be admitted as evidence; for the whole proof must be deduced in open court, in presence of the assize or jury, as well as of the pannel, 1587, c. 90*. A judicial confession ought to be received with all the qualities that the pannel has thought fit to adject to it; so that the prosecutor, who pleads upon one part of it, must admit the whole. Proof by writing is seldom used, but in usury, forgery, and perjury. Tho' in deforcement, the written execution of the messenger or officer is sufficient evidence of the violence, in all civil questions concerning the validity of the diligence, till it be declared false; yet in a criminal trial moved against the deforcers, the messenger's execution, who is a party interested in the prosecution, is not regarded.

59. All objections relevant against a witness in civil cases, are also relevant in criminal. No witness is admitted who may gain or lose by the event of the trial. Hence, in the crime of usury, the testimony of him who has given the unlawful profits is rejected, because he becomes

* See, act 23. Geo. c. 45. dispensing with the former practice of taking down the evidence in writing.

becomes a gainer by the conviction of the usurer, 1600. c. 7. In deforcement, the persons employed by the messenger to attest the execution, are in some sense parties, violence being commonly used against them, as well as against the messenger; yet, as the proof of the crime would be frequently impracticable, if their evidence were rejected, the law considers the messenger as the only party against whom the violence is intended, and therefore receives the testimony of the witnesses, tho' they should be beaten. *Socii criminis*, or associates in the same crime, are not admitted against one another, except either in crimes against the state, as treason; in occult crimes, where other witnesses cannot be had, as forgery; or in thefts or depredations committed in the Highlands, 21. *Geu. II. c. 34. § 21.* The testimony of the private party injured may be received against the pannel, where the King's Advocate is the only prosecutor, if, from the nature of the crime, there must needs be a penury of witnesses, as in rape, robbery, &c.

So ii criminis.

Party injured.

60. Where a crime is to be proved by several circumstances connected together, every one of which makes a part of the same criminal act, a single witness to each circumstance is sufficient evidence. But it may be doubted, whether this ought to obtain in crimes reiterated by different criminal acts. For if a single witness should be deemed sufficient in such case, for proof of each separate act, it would destroy one of the strongest checks by which the testimony of false witnesses may be controlled; see 7. *Gul. III. c. 3. § 4.* Formerly, the depositions of witnesses, in all trials before the

Must two witnesses concur to each act?

Proof by
presump-
tion.

criminal court, were reduced into writing; but that practice is abolished by 21. Geo. II. c. 19. unless where the libel concludes death or de-
membration. Crimes which, by their nature, hardly admit direct evidence, may be proved by presumptive; and these presumptions ought, from the severity of the conclusions in criminal trials, to be so pregnant, as necessarily to carry conviction along with them: but where a crime is to be tried only *ad civilem effectum* e. g. where a process of adultery is brought for obtaining a divorce, more slender presumptions will be received; so that the same proof that has been judged sufficient for procuring a divorce before the commissaries, may be cast, if the crime should be afterwards tried criminally.

Verdict of
assize.

61. After all the witnesses have been examined in court, the assizers are shut up in a room by themselves, where they must continue, excluded from all correspondence, till their verdict or judgment be subscribed by the foreman (or chancellor), and clerk, 1587, c. 91.—1672, c. 16. art. 38. concerning the justice-court; and, according to this verdict, the court pronounces sentence, either absolving or condemning. It is not necessary, by the law of Scotland, that a jury should be unanimous in finding a person guilty; the narrowest majority is as sufficient against the pannel, as for him. Juries cannot be punished on account of an erroneous verdict, either for or against the pannel; but they might, by our former law, for absolving him against clear evidence. This crime of wilful error in an assize was tried, by a grand assize, consisting of twenty five gentlemen possessed of land-estates; and was punished

Assize of
error.

ed by imprisonment for a year, forfeiture of moveables, and infamy, *R. M. l. 1. c. 14. § 2. et seqq.*—1475, c. 64. But these assizes of error have been, at no period, much in use, see *Skene. voce Assisa*; and they are declared a grievance by the convention of estates, 1689, c. 18.

62. Tho' the proper business of a jury be to inquire into the truth of the facts found relevant by the court, for which reason they are sometimes called the inquest; yet, in many cases, they judge also in matters of law or relevancy. Thus, tho' an objection against a witness should be repelled by the court, the assizers are under no necessity to give more credit to his testimony than they think just: And in all trials of art and part, where special facts are not libelled, the jury, if they return a general verdict, are indeed judges, not only of the truth, but of the relevancy of the facts that are sworn to by the witnesses. A general verdict, is that which finds, in general terms, that the pannel is guilty or not guilty, or that the libel or defences are proved or not proved. In a special verdict, the jury finds certain facts proved, the import of which is to be afterwards considered by the court.

Powers of a jury in matters of law.

General verdict.

63. By our old law, the sheriff was confined to a definite time, in pronouncing and executing sentence on certain criminals. When a murderer was taking red hand, *i. e.* apprehended in the criminal act, it behoved the sheriff, not only to try him, but to execute the sentence within three suns; whereas, if he was apprehended *ex intervallo*, forty days were allowed for that purpose, 1426, c. 90.—1491, c. 28. it was afterwards

Sentences, within what time, to be executed.

afterwards provided, by 1695, c. 4. that in all cases where the sheriff was tied down to do justice in three suns, sentence might be executed at any time within nine days, provided it had been pronounced within three. But, by our present law, criminal judges not only may, but must, suspend for some time the execution of such sentences as affect life or limb, that so condemned criminals, whose cases deserve favour, might have access to apply to the King for mercy. No sentence of any court of judicature, south of the river Forth, importing either capital or corporal punishment, could be executed in less than thirty days; and, if north of it, in less than forty, after the date of the sentence, by 11. Geo. I. c. 26. § 10. This act, in so far as it concerns corporal punishments, less than death or dismembering, e. g. whipping, pillory, &c. is altered; so that judges may now inflict these, eight days after sentence on this side Forth, and twelve days after sentence beyond it, 3. Geo. II. c. 32.

Extinction
of crimes
by death;

64. Crimes are extinguished, 1. By the death of the criminal; both because a dead person can make no defence, so that his trial is truly a judging upon the hearing of one side; and because, tho' his guilt should be ever so notorious, he is, after death, carried beyond the reach of human penalties, and consequently continues no longer an object of correction, which is one of the great purposes of punishment; Such trials, therefore, can have no effect, but to punish the innocent heir, contrary to that most equitable rule, *culpa tenet suos auctores*. 2. Crimes may be extinguished by a remission from the sovereign. But a remission, though it secures the delinquent

by remission.

delinquent from the public resentment, the exercise of which belongs to the crown, cannot cut off the party injured from his claim of damages, over which the crown has no prerogative. Agreeable to this distinction, no person was allowed to plead a remission, till he had given security to satisfy the private party, 1457, c. 74.—1528, c. 7; and, in the case of slaughter, it behoved the wife or the executors of the deceased, who were entitled to that satisfaction, or, as it is called in the stile of our statutes, assythment, to sign letters of *slains*, acknowledging that they had received satisfaction, before any remission could be granted to the slayer, 1592, c. 155. No. 1.—1593, c. 174. Whoever therefore, founds on a remission, is liable in damages to the private prosecutor, in the same manner, as if he had been tried and found guilty. Even general acts of indemnity passed in parliament, tho' they secure against such penalties as law inflicts upon the criminal, merely *per modum poenae*, 1. July 1713, *Stuart*; yet do not against the payment of any pecuniary fine, which is given by statute to the party injured, 22. Feb. 1712, *Robertson*; nor consequently against the demand of any claim competent to him, in name of damages.

Acts of indemnity.

65. Lesser injuries, which cannot be properly said to affect the public peace, may be extinguished, either by the private party's expressly forgiving them, or by his being reconciled to the offender, after receiving the injury. Hence arises the rule, *diffimulatione tollitur injuria*. But, where the offence is of a higher nature, the party injured, though he may pass from the prosecution, in so far as his private interest

Extinction by the party's forgiving the offence;

interest is concerned, cannot preclude the King's Advocate, or procurator-fiscal, from insisting *ad vindictam publicam*.

by pre-
scription.

Short pre-
scription
of certain
crimes by
statute ;

without
statute.

66. Crimes are also extinguished by prescription, which operates by the mere lapse of time, without any act, either of the Sovereign or of the private sufferer. Crimes prescribe, both by the Roman law, *l. 12. C. ad. leg. Corn. de fals.* and by the custom of Scotland, (see *Maccken. Crim. tit. Prescription*)*, in twenty years; but, in particular crimes, the prescription is limited by statute to a shorter time. No person can be prosecuted upon the act against wrongous imprisonment, after three years, 1701, *c. 6*. High treason, committed within his Majesty's dominions, suffers likewise a triennial prescription, if indictment be not found against the traitor by a grand jury within that time, 7. *Gull. ill. c. 3. § 5*. All actions, brought upon any penal statute made or to be made, where the penalty is appropriated to the crown, expire in two years after committing the offence; and where the penalty goes to the crown, or other prosecutor, the prosecutor must sue within one year, and the crown within two years after that year ended, 31. *Eliz. c. 5.*: And this, tho' an English act, affects Scotland, as it limits all the penal British statutes passed since the union, which concern this part of the united kingdom. Certain crimes are, without the aid of any statute, extinguished by a shorter prescription than twenty years. By our old law *R. M. l. 4. c. 10*. in the cases of rape, robbery, and hame sucking, the party injured was not

* See *Dict. of Dec. vol. 3. p. 307. Macclaurin Crim. p. 595. 773.*

not heard, after a silence of twenty-four hours, from a presumption, that persons could not be so grossly injured, without immediately complaining: And it is probable, that a prosecution for these crimes, if delayed for any considerable time, would be cast, even at this day, or at least the punishment restricted. Lesser injuries suffer also a short prescription; law *presuming* forgiveness, from the nature of the offence, and the silence of the party. The particular space of time sufficient to establish this presumption must be determined by the judge, according to circumstances.

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THE HISTORY OF THE
CITY OF NEW YORK

FROM THE FIRST SETTLEMENT
TO THE PRESENT TIME
BY J. M. SMITH
IN TWO VOLUMES
VOL. I
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The history of the city of New York, from the first settlement to the present time, is a subject of great interest and importance. It is a subject which has attracted the attention of many writers, and which has been the subject of many books. The history of the city of New York is a subject which is of great interest to all who are interested in the history of the United States. It is a subject which is of great importance to all who are interested in the history of the world. The history of the city of New York is a subject which is of great interest to all who are interested in the history of the United States. It is a subject which is of great importance to all who are interested in the history of the world.

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